

6
No. 10063

United States

Exhibits in case
of Clerk...
VRL
2323

Circuit Court of Appeals

For the Ninth Circuit.

UNION PACIFIC RAILROAD COMPANY, a
corporation,

Appellant,

vs.

ALBERT G. STANGER and PHYLLIS
STANGER,

Appellee.

Transcript of Record


Upon Appeal from the District Court of the United
States for the District of Idaho,
Eastern Division.

FILED

APR - 2 1942

PAUL P. O'BRIEN,

CLERK



Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

United States
Circuit Court of Appeals

For the Ninth Circuit.

UNION PACIFIC RAILROAD COMPANY, a
corporation,

Appellant,

vs.

ALBERT G. STANGER and PHYLLIS
STANGER,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United
States for the District of Idaho,
Eastern Division.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Answer to Complaint.....	8
Appeal:	
Bond on	61
Designation of Contents of Record on (Circuit Court of Appeals).....	310
Designation of Contents of Record on (District Court)	306
Notice of	52
Order Approving Bond and Granting a Stay of Execution.....	54
Statement of Points on (Circuit Court of Appeals)	310
Statement of Points on (District Court).....	66
Supersedeas Bond	55
Application for Order Dispensing with Original Exhibits	314
Certificate of Clerk to Transcript of Record on Appeal	308
Complaint	1
Conclusions of Law.....	26

Index	Page
Cost Bond on Appeal.....	61
Designation of Contents of Record on Appeal (Circuit Court of Appeals).....	310
Designation of Contents of Record on Appeal (District Court)	306
Findings of Fact and Conclusions of Law.....	16
Judgment	28
Minutes of the Court (October 20, 1941).....	304
Minutes of the Court (October 21, 1941).....	305
Minutes of the Court (October 22, 1941).....	305
Notice of Appeal.....	52
Objections to Findings and Motion to Amend Findings and Conclusions of Law.....	29
Opinion	12
Order Amending Findings of Fact.....	44
Order Approving Bond and Granting a Stay of Execution	54
Order as to Original Exhibits.....	303
Order Dispensing with Original Exhibits.....	315
Order Denying Motion for New Trial.....	52
Order for Removal.....	11
Order on Motion to Amend Findings and Con- clusions of Law.....	43
Petition and Motion for New Trial.....	45
Petition for Approval of Supersedeas and Stay on Appeal.....	53

Index	Page
Removal, Order for.....	11
Statement of Points on Appeal (Circuit Court of Appeals)	310
Statement of Points on Appeal (District Court)	66
Supersedeas Bond	55
Testimony	68
Certificate of Reporter to Reporter's Tran- script	302
Exhibit for defendant:	
2—Letter dated January 2, 1941 to Wil- liam M. Jeffers from A. G. Stanger	132
Motion of Defendant for Judgment.....	302
Motion to Strike Testimony of Albert Gardner	198
Witnesses for defendant:	
Brothers, W. W.	
—direct	245
—cross	251
—redirect	258
—recross	259
Cline, Clifford M.	
—direct	199
—cross	208
—redirect	214

Index	Page
Witnesses for defendant (cont'd):	
Gardner, Albert	
—direct	188
—cross	192
—redirect	196
—recross	197
Lewis, Robert J.	
—direct	178
—cross	182
—redirect	186
—recross	187
Nichols, L. R.	
—direct	260
—cross	264
O'Rullian, George	
—direct	159
—cross	163
—redirect	165
—recross	167
—redirect	167
Schroder, John A.	
—direct	265
—cross	269
—redirect	275
Walker, Lee	
—direct	168
—cross	175

Index	Page
Witnesses for defendant (cont'd):	
Wooley, Dr. Hoyt B.	
—direct	215
—cross	231
—redirect	243
—recross	243
Witnesses for plaintiffs:	
Hatch, Dr. H. Ray	
—direct	93
—cross	97
—redirect	113
—recross	116
Lynn, J. H.	
—direct	151
Pflasterer, Claude R.	
—direct	276
—cross	290
—redirect	294
Savage, Robert W.	
—direct	294
Stanger, Albert G.	
—direct	70
—recalled, direct	117
—cross	117
—redirect	128
—recross	130
—redirect	132
—recalled, cross	157

Index	Page
Witnesses for plaintiffs (cont'd):	
—redirect	158
—recross	158
—redirect	158
—recalled, direct	296
Stanger, Phyllis	
—direct	136
—cross	145
—redirect	150
—recalled, direct	300
—cross	301

In the District Court of the Fifth Judicial District
of the State of Idaho, in and for the County
of Bannock.

No. 1149

ALBERT G. STANGER and PHYLLIS
STANGER,

Plaintiffs,

vs.

UNION PACIFIC RAILROAD COMPANY,
Defendant.

COMPLAINT

Plaintiffs for cause of action against the defendant complains and alleges:

I.

That at all times hereinafter mentioned the plaintiffs were and still are husband and wife, and citizens and residents of the State of Idaho.

II.

That at all times hereinafter mentioned the defendant was and still is a corporation, duly organized and existing under the laws of the State of Utah, and duly authorized and qualified to do business in the State of Idaho by having complied with the Constitution and laws of the State of Idaho with respect to foreign corporations.

III.

That the defendant is a common carrier of freight and passengers and owns large and extensive lines, or system of railroads, commencing at Butte, Montana, on the north and extending through the State of Idaho, through the State of Utah and on to Los Angeles, California, on the south; and commencing at Portland, Oregon, on the west and extending through to Council Bluffs, Iowa, on the east; together with divers and numerous branch lines, running off and extending from said main lines; and among other lines, one running through the City of Denver in the State of Colorado. [1*]

IV.

That on the 13th day of January, 1940, the plaintiffs purchased of and from the defendant, as a common carrier, a passenger ticket for the plaintiff Phyllis Stanger to ride upon its trains from Idaho Falls, Idaho, at the point where said ticket was purchased, over the defendant's lines, through the states of Idaho and Wyoming and into Colorado, to the City of Denver, and then on south, over other lines to Houston, Texas; that the plaintiffs purchased said ticket of and from the defendant and paid the full fare therefor.

V.

That pursuant to the privilege granted by said ticket, the plaintiff Phyllis Stanger boarded one of

*Page numbering appearing at foot of page of original certified Transcript of Record.

the defendant's trains and a Pullman attached thereto, and rode therein from Idaho Falls to a point within approximately thirty miles of the City of Denver in the State of Colorado, which was at said time and place upon the said defendant company's line of railroad, and in one of the defendant's trains, and upon which the plaintiff Phyllis Stanger was a passenger for hire at said time and place, at which said point said train, through the negligence, carelessness, and heedlessness of the defendant, its agents, servants, and employees, acting in the line, course, and scope of their employment; and by reason of the defective equipment, roadbed, and tracks, said train derailed and left the tracks at said point, approximately thirty miles from the City of Denver, State of Colorado.

VI.

That at said time and place, and while the plaintiff Phyllis Stanger was a passenger upon the defendant company train for hire, as aforesaid, the plaintiff Phyllis Stanger received the permanent, painful, and excruciating injuries hereinafter set out with greater particularity, as a proximate result of the negligence of the defendant, its agents, servants, and employees, while acting within the line, course, and scope of their employment. [2]

VII.

That at said time and place said train derailed and left said track and the trucks under the car

upon which the plaintiff, Phyllis Stanger, was riding, or the trucks under the car immediately ahead thereof, as to which the plaintiffs are not advised, but which is well known to the defendant, came out from under said car and along and up to the side of the coach or car in which the plaintiff Phyllis Stanger was riding, and did collide with and strike the same, and did then and there throw and cast and crush the plaintiff, Phyllis Stanger, against parts of said car or coach, in which she was riding, and did then and there injure her spine, back, shoulders, and legs, and injured her internally; and did then and there inflict severe and permanent injuries upon her nervous system, and did render her sick, sore, and lame, and she did suffer from said injuries and has suffered ever since receiving the same, and will continue to suffer therefrom so long as she may live; and she has been rendered unable to rest or sleep at night; and has been made extremely nervous; and that by reason of said injuries, the plaintiff, Phyllis Stanger, has lost a great amount of weight; that by reason of said injuries she has been caused to sustain a great amount of flow incidental to monthly periods, and which has continued, and which she has been unable to have stopped until she sustained a surgical operation, which operation was made necessary by reason of said injuries received at said time and place; that by reason of said injuries to the female organs and operation of the said Phyllis Stanger, she has been rendered sterile.

VIII.

That in an effort to effect a cure of said Phyllis Stanger, and required to perform said operation, the plaintiffs were compelled to and did employ doctors, physicians, and surgeons, and nurses, and purchased medicines, and did place said Phyllis Stanger in a hospital, upon the advice of the said plaintiff's doctors; and that the amount of said doctors' bills, hospital bill, nurses' bills, and medicines were as follows, to-wit: Doctors' bills \$339.00; [3] nurses' bills, \$150.00; hospital bill, \$191.80, miscellaneous drugs, bandages, etc., \$152.50; that it was necessary for the plaintiff Phyllis Stanger, by reason of said injuries, to have two blood transfusions and certain injections preliminary thereto, and said injections and transfusions were necessary for and preliminary^e to the operation hereinbefore mentioned; that the plaintiffs were required to lay out and expend for said injections and blood transfusions the sum of \$125.00.

IX.

That prior to receiving said injuries, the plaintiff Phyllis Stanger was always able to and did perform her household duties, or the greater portion thereof; that after receiving said injuries she was unable to do so, and plaintiffs were compelled to employ extra help to perform the work around the home of the plaintiffs, which, up to April 4, 1941, amounted to the sum of \$735.00; and the plaintiffs have been since said time, and will in the future be required to employ extra help to perform

work and labor around their home, for which they will be compelled to lay out and expend wages.

X.

That at the time of the derailment of said train, and the injury sustained by the plaintiff Phyllis Stanger, the clothes and luggage of the plaintiff Phyllis Stanger were damaged and destroyed and her wrist watch and other effects were damaged and destroyed; that the reasonable value of the clothes, wrist watch, and other effects of the plaintiff Phyllis Stanger that were damaged and destroyed at said time and place, by reason of said wreck and derailment, was the sum of \$195.00.

XI.

That all of the sums laid out and expended by the plaintiffs for doctors' bills, hospital bills, nurses' hire, and medicines, employment of help around the home of the plaintiffs, and for said injections and blood transfusions were reasonable for the services rendered by the persons by whom such services were rendered. [4]

XII.

That in addition to the damages aforesaid, the plaintiff, Phyllis Stanger, has suffered general damages in the sum of \$50,000.00.

XIII.

That all of the damages sustained by reason of the premises were proximately caused by the negligence, carelessness, and heedlessness of the defendant, its

agents, servants, and employees, while acting within the line, course, and scope of their employment.

Wherefore plaintiffs pray judgment against the defendant for the sum of \$1,888.30 special damages, and general damages in the sum of \$50,000.00, costs of suit and general relief.

JOHN FEREBAUER,
Res. Idaho Falls, Idaho.
ANDERSON, BOWEN &
ANDERSON,
Res: Pocatello, Idaho
Attorneys for Plaintiff.

State of Idaho
County of Bonneville—ss.

Albert G. Stanger, being first duly sworn, deposes and says: That he is one of the plaintiffs in the above and foregoing complaint; that he has read the same, knows the contents thereof, and that the same are true as he verily believes; that he makes this verification for and on behalf of himself and of his wife, the co-plaintiff herein.

A. G. STANGER.

Subscribed and Sworn To before me this 14th day of July, 1941.

(Seal) GEO. W. EDGINGTON,
Notary Public for Idaho
Res: Idaho Falls, Idaho.

[Endorsed]: Filed in County Court July 16, 1941.

[Endorsed]: Filed in U. S. District Court August 11, 1941. [5]

[Title of County Court and Cause.]

ANSWER

Comes now the defendant, Union Pacific Railroad Company, and for answer to the complaint filed herein, admits, denies and alleges as follows:

I.

Admits the allegations contained in paragraphs I, II and IV of said complaint.

II.

Defendant denies each and every allegation contained in paragraphs VI, VII, XI and XIII of said complaint.

III.

Answering paragraph III of said complaint, defendant admits that it operates a line of railroad from Butte, Montana extending through the States of Idaho and Utah and to Los Angeles, California, and from Portland, Oregon to Council Bluffs, Iowa, with numerous branch lines extending off to different points and places and among others the city of Denver, in the State of Colorado.

IV.

Answering paragraph V of said complaint, defendant admits that the plaintiff Phyllis Stanger boarded one of defendant's trains at Idaho Falls, Idaho, and rode over defendant's line of railroad in a Pullman car to a point within approximately

30 miles of the City of Denver, State of Colorado, when certain cars of the train upon which said plaintiff was riding were derailed. Defendant denies [6] each and every allegation contained in said paragraph.

V.

Answering paragraph VIII of said complaint, defendant denies each and every allegation contained therein, and specifically denies that the plaintiffs were damaged in the sum of \$339.00 for the doctors' bills, \$150.00 for nurses' bills, \$191.80 for hospital bills, \$152.50 for medicines, drugs, bandages, etc., and \$125.00 for injections and blood transfusions, or in any amount or at all.

VI.

Answering paragraph IX of said complaint, defendant denies each and every allegation contained therein and specifically denies that the plaintiffs were damaged in the sum of \$735.00 for extra help to perform work and labor around the home, or in any amount or at all.

VII.

Answering paragraph X of said complaint, defendant denies each and every allegation contained therein, and specifically denies that the plaintiff Phyllis Stanger was damaged in the sum of \$195.00 for loss of property as alleged in said paragraph, or in any amount or at all.

VIII.

Answering paragraph XII of said complaint, defendant denies that the plaintiff Phyllis Stanger suffered damages in the sum of \$50,000 or in any amount or at all.

IX.

Defendant denies each and every allegation contained in said complaint not hereinbefore expressly admitted or denied.

Wherefore said defendant having fully answered herein prays to be hence dismissed with its just costs and disbursements [7] herein incurred.

GEO. H. SMITH,

H. B. THOMPSON,

L. H. ANDERSON,

Attorneys for Defendant.

Residence & P. O. Address,

Attorneys for Defendants:

Geo. H. Smith,

Salt Lake City, Utah.

H. B. Thompson, and

L. H. Anderson,

Pocatello, Idaho.

(Duly verified)

[Endorsed]: Filed in County Court Aug. 4, 1941.

[8]

[Title of County Court and Cause.]

ORDER FOR REMOVAL

This cause coming on regularly for hearing upon the petition and bond of the defendant Union Pacific Railroad Company herein for an order transferring this cause to the United States District Court for the District of Idaho, Eastern Division, and it appearing to the court that said defendant Union Pacific Railroad Company has filed herein its petition for such removal in due form of law and that said defendant Union Pacific Railroad Company has filed its bond duly conditioned, with good and sufficient surety, as provided by law, and that said defendant has given the plaintiffs due and legal notice thereof, and it appearing to the court that this is a proper cause for removal to said United States District Court.

Now, Therefore, said bond is hereby approved and it is hereby ordered and adjudged that this cause be and it hereby is removed to the United States District Court for the District of Idaho, Eastern Division, and the Clerk is hereby directed to make up the record in said cause for transmission to said court forthwith.

Dated, this 7th day of August, 1941.

ISAAC McDOUGALL,
District Judge.

[Endorsed]: Filed in County Court Aug. 7, 1941.

[9]

[Title of District Court and Cause.]

OPINION

John Ferebauer, Idaho Falls, Idaho

Clyde Bowen, Pocatello, Idaho

W. H. Witty, Pocatello, Idaho

Attorneys for the Plaintiffs,

George H. Smith, Salt Lake City, Utah

H. B. Thompson, Pocatello, Idaho

L. H. Anderson, Pocatello, Idaho

Attorneys for the Defendant.

December 6, 1941

Cavanah, District Judge.

It appears that there were two cases brought, one for Albert G. Stanger and Phyllis Stanger husband and wife for alleged injuries to Phyllis Stanger and one by Albert G. Stanger for injuries claimed to have been received by him at the same time when traveling as passengers in a standard Pullman car on the train of the defendant. The two cases were consolidated for trial and proceeded under the above title.

The two issues presented were:

First: Was the defendant negligent in the manner alleged in the complaint? And

Second: If so, did the plaintiffs receive any injuries by reason of such negligence at the time of the accident?

The plaintiffs rely on the doctrine of *res ipsa loquitur* and urge that in the application of the rule that the present cases are within the class that

where the circumstances or the occurrence that has caused injury are of a character to give ground for reasonable inference that if due care had been employed by the defendant, charged [10] with care, the occurrence that happened would not have happened, and the defendant not having rebutted that, from the way in which the occurrence happened it may fairly be found to have been occasioned by negligence, and that where the defendant was engaged in carrying passengers, it must exercise the utmost care and diligence or the highest degree of care and prudence and foresight for the passengers' safety. On the other hand the defendant contends that the track and roadbed was in first class condition and that the derailment was caused by a broken wheel, the cause of which could not have been discovered by any known test or by any human foresight or experience, and therefore negligence was completely taken out of the case.

The accident having happened while plaintiffs were passengers on defendant's train, the presumption of negligence arises, if they were injured as a result of the derailment, which must be rebutted by the defendant, and the further principle that the railroad company owes the highest degree of care and the duty of inspection of its equipment to its passengers.

A fair analysis of the evidence as to these contentions will disclose that the defendant did not, prior to the accident use that degree of care of inspecting its equipment which the law requires, such

as the broken wheel and trucks under the cars and other equipment which contributed to the cause of the derailment.

This duty was upon the defendant when it accepts passengers and when we apply the doctrine of *res ipsa loquitur* it was upon the defendant to explain, which it did not, as stated, that the train wreck was not caused by any negligence on its part and therefore the conclusion must be reached that the cause of the accident was due to the negligence of the defendant.

— We then approach the question of, to what extent, if any, were the plaintiffs injured?

Referring to the claim of injuries of the plaintiff Albert G. Stanger, the evidence discloses that he did not receive any injury by reason of the accident as his conduct immediately after the [11] accident, up to the present time, shows that he has been very active, while on the trip following the accident, to Texas and Mexico, and since returning home. It is unnecessary to discuss the evidence in this respect for it is too clear in disclosing that the accident did not interfere with his usual activities while he was on such, and other pleasure trips, and since, in his usual and outstanding golf playing. He did not and does not now suffer from any injuries either permanent or temporary and therefore is not entitled to recover any amount from the defendant.

As to whether plaintiff Phyllis Stanger has suffered any injury by reason of the accident it seems

that she did receive injuries, as her physical condition since the accident has been such as to cause one to believe that the jar she received at the time of the accident did effect her as she was struck over the abdomen by the edge of a card table which they were using at the time, and that she immediately after the accident began to flow excessively, which continued until the time of her operation at which the Doctor removed the uterus which made her sterile, presenting a condition which is regarded as permanent, and deprives her of one of the natural gifts, and that the operation was necessary in order to stop the excessive flowing, and the nervous stress and pain under which she was suffering was all a contributing factor to the excessive flowing which was due to the accident and negligence of the defendant. She was, before the accident, a young woman, able to perform her regular duties as a housekeeper and after the accident she was for some time unable to do such work and was compelled to employ a maid until a few weeks before the trial. There is no doubt that she has suffered and received such injuries by reason of the accident and negligence of the defendant, and has been compelled to expend certain sums for maid assistance, Doctors, medicine and hospital bills.

Considering then, these sums so paid out and the reasonable compensation for the condition and the suffering which she has undergone, the sum of \$19,000.00 will be a reasonable amount to be awarded on account of her injuries which she re-

ceived by reason of the accident and negligence of the defendant; and costs.

This amount is awarded in case No. 1149.

[Endorsed]: Filed Dec. 6, 1941. [13]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above noted cases came on regularly for trial before the above entitled court without the intervention of a jury at the October, 1941, term of the above entitled court at Pocatello, Bannock County, Idaho. That there were two cases brought, one of Albert G. Stanger and Phyllis Stanger, husband and wife, for injuries to Phyllis Stanger, and one by Albert G. Stanger for injuries claimed to have been received by him. That the parties by written stipulation consented and agreed that the two cases may be consolidated for trial, the case of Albert G. Stanger vs. Union Pacific Railroad Company, a corporation, being case No. 1148, and Albert G. Stanger and Phyllis Stanger vs. Union Pacific Railroad Company, a corporation, being case No. 1149. That neither party demanded a jury and consented that the cases may be tried before the court without the intervention of a jury on all issues.

I.

That the court finds that the plaintiffs at all times mentioned herein were husband and wife and citizens and residents of Idaho Falls, State of Idaho. And that the defendant at all times herein mentioned is and was a corporation duly organized and existing under the laws of the State of Utah and by compliance with the constitution and laws of the State of Idaho with respect to foreign corporations, doing business in the State of Idaho, is authorized and qualified to do and transact business in the State of Idaho as a foreign corporation. [14]

II.

That on January 13 and 14, 1940, the defendant Union Pacific Railroad Company, a corporation, was engaged as a common carrier of passengers for hire in interstate commerce and transportation.

III.

That on January 13, 1940, the plaintiffs purchased of and from the defendant as such common carrier two passenger tickets paying the full price therefor entitling them to ride on defendant's passenger trains from Idaho Falls, Idaho through the State of Idaho, through the State of Wyoming and to Denver in the State of Colorado and on to Houston in the State of Texas. That on January 13, 1940, as aforesaid the plaintiffs boarded one of defendant's passenger trains at Idaho Falls, Idaho and rode in a standard pullman car, which car constituted a

part of one of defendant's passenger trains, from the City of Idaho Falls, Idaho to a point approximately 37 miles from the City of Denver in the State of Colorado, at which point on January 14, 1940, a number of the cars of defendant's said passenger train, including the standard pullman car in which the plaintiffs were riding, derailed or wrecked.

IV.

That at the time of the derailment or wreck the passenger train of the defendant consisted of a number of passenger cars, there being 7 or 8 passenger cars in said train, to which an engine was attached, and that at the time of the said wreck or derailment or immediately before, the said passenger train was traveling at a speed of between 60 and 65 miles per hour. The weather at the time of the derailment or wreck was cold and there was snow on the ground. At the time of the said wreck or derailment the said engine and cars were traveling upon the defendant's line of railroad and was under the care, management and control of the defendant company, its agents, servants and employees, who were then and there acting within the line, scope and course of their employment.

V.

That at the time of the accident or derailment or wreck the plaintiffs were seated in the seats of the standard pullman car. [15] The plaintiff Phyllis Stanger was facing the direction in which the train

was moving and her husband was seated directly across the table from her and were both seated next to the windows of said standard pullman car. Plaintiffs with two other persons who were riding upon said train were seated at a card table that had been furnished by the defendant company and were engaged, at the time of the wreck, in a game of cards. At the time the wreck or derailment occurred the plaintiff Phyllis Stanger was thrown suddenly and violently and without warning, forward, striking her in abdomen across and against the edge of said card table and was thrown with great force and violence against other parts of said car severely and permanently injuring her internally and bruising and inflicting upon her injuries about the back, legs and hand. The card table that had been furnished by the defendant as aforesaid and that was being used at said time and place by the plaintiffs was firmly attached to the side wall of the pullman car in at least two places by iron braces or attachments. The top of said table was approximately 27 inches above the floor of the standard pullman car and was approximately 2½ feet wide and approximately 3 feet long, the edge of the said table being approximately ½ inch in depth or thickness.

VI.

That at the time of the derailment or wreck the pullman car in which the plaintiffs were riding was derailed or left or was thrown from the rails upon

which it had been traveling and the end of the standard pullman car in which the plaintiffs were seated and riding left the rails of the railroad track and went down into the barrow pit and struck against a bank of solid or frozen earth that was approximately 4 feet high causing the said car to come to a sudden violent stop. The rails upon which said car had been traveling before being derailed were torn loose from the ties to which they had been attached and were twisted and bent. When the standard pullman car came to rest after the derailment it was in a tilted position and standing at an angle from the tracks. [16]

VII.

That at the time of the accident the plaintiff Phyllis Stanger was thrown forward violently against the edge of the card table that had been furnished for her use by the defendant company and struck her on and across her abdomen on and against the said card table with such force and violence that she very shortly thereafter, and before leaving the scene of the wreck, began to flow excessively. Which excessive flowing continued from the time immediately after the accident and until after her return home at Idaho Falls, Idaho and until she underwent a surgical operation by one Dr. Hatch at Idaho Falls, Idaho in July of 1940. That at the time the surgical operation was performed upon her by the said Dr. Hatch in July of

1940 her uterus was removed because of the said injuries received at the time of the accident, and the resultant excessive flowing, and the removal of her uterus thereby making her sterile, which condition is permanent and deprives her of a natural gift. That the removal of her uterus was necessary in order to stop or correct her excessive flowing of blood. That the nervous stress and nervous shock received at the time of the accident and derailment caused and greatly contributed to her excessive flowing. That at the time of the said accident and derailment the said Phyllis Stanger received great nervous shock and injury and experienced at said time and place severe nervous stress in addition to the actual physical injuries. And because of the excessive flowing and the length of time the same continued the said plaintiff Phyllis Stanger became physically weak and in a general run-down physical condition. That prior to the accident the plaintiff was a young woman approximately 28 years of age, the mother of three children and enjoying reasonably good health and was able to and did perform the greater portion of the ordinary duties of a housekeeper, wife and mother. [17]

VIII.

That after the accident and until a few weeks before the trial of this cause she was unable to perform her household duties because of her physical weakness and her nervous condition brought about by said physical weakness and her nervous

condition brought about by said excessive flowing and as a result of the injuries received in said accident, and the plaintiffs were compelled to and did employ a maid to perform the work about the house and home that the said Phyllis Stanger had theretofore performed prior to the accident.

IX.

That the excessive flowing that commenced immediately after said accident and all of the personal injuries received by the plaintiff Phyllis Stanger in said accident were proximately caused by and due to the negligence and carelessness of the defendant, its agents, servants, and employees acting within the line, course and scope of their employment. That the excessive flowing and the removal of the uterus of the said Phyllis Stanger thereby making the said plaintiff Phyllis Stanger sterile and the nervous shock and all of the personal injuries suffered and received by the said plaintiff Phyllis Stanger in said accident were due to and proximately caused by the negligence and carelessness of the defendant, its servants, agents and employees acting with the line, course and scope of their employment in failing in their duty of inspection of the passenger cars and equipment prior to the time the said accident occurred.

X.

That the plaintiff Albert G. Stanger in case No. 1148 herein did not receive any personal injuries by reason of the accident or derailment and he does

not now suffer from any injuries either permanent or temporary, received at the time of the wreck or derailment of the defendant's passenger train at the time and place aforesaid and the derailment of said standard pullman car in which he was riding as a paid passenger at the time and place aforesaid mentioned herein. [18]

XI.

That in an effort to effect a cure for the injuries of the plaintiff Phyllis Stanger a surgical operation was performed upon her and the plaintiffs incurred large expenditures of money for physicians and surgeons, hospital bills and nurse's hire and medicines, and the court finds that the sums laid out and expended for such services of physicians and surgeons and hospital bills and nurse's hire and medicines and hiring of help were reasonable for the service rendered.

XII.

That the defendant, its agents, servants and employees, at the time and place of the derailment mentioned herein and the accident that occurred and prior thereto owed to the plaintiffs who were riding as paid passengers on a regular passenger train in charge of, controlled and under the management of the defendant, its agents, servants, and employees a high degree of care for their safety, and the duty of inspection, control, maintenance and management of the passenger cars and the trucks underneath the same and all other equipment con-

nected therewith, and that if the defendant, its agents, servants and employees then and there acting within the line, course and scope of their employment had exercised and discharged to the plaintiffs that degree of duty and degree of care of inspection and maintaining and management and controlling of its passenger equipment and cars and trucks and other equipment connected therewith, prior to the time the accident occurred, that is required by the law of common carriers by rail engaged in the transportation of paid passengers on passenger trains for hire as under the facts and circumstances disclosed by the evidence herein, the derailment and the resulting injuries to the plaintiff Phyllis Stanger in case No. 1149 would not have occurred.

XIII.

The facts and circumstances of this case bring the plaintiffs within that class of cases that where the circumstances of the [19] occurrence that has caused injuries are of a character to give ground for reasonable inference that if due care had been employed by the defendant, charged with care, the occurrence that happened would not have happened, and gives ground for the reasonable inference in this case that if due care had been employed by the defendant, its agents, servants and employees, who were then and there charged with care in the inspection, maintenance, management and control of its passenger cars and of the equipment connected

therewith that the occurrence that happened would not have occurred. This presumption must be rebutted by the defendant. The defendant by its evidence in the case of Albert G. Stanger and Phyllis Stanger having failed to rebut the inference of negligence drawn from the facts and circumstances of this accident that due care, inspection and management and control had been employed by the defendant, its agents, servants and employees, the derailment and consequent injuries would not have occurred. That it appears clearly from a fair analysis of defendant's evidence that the defendant, its agents, servants and employees acting within the line, course and scope of their employment, did not, prior to the accident, exercise or use or discharge that degree of care of inspecting, maintaining, managing and operation of its passenger equipment that the law requires of it as under the facts and circumstances in these cases required. That all of the injuries and loss received by the plaintiff Phyllis Stanger aforesaid were proximately caused by and due to the negligence of the defendant, its agents, servants and employees while acting within the line, course and scope of their employment.

XIV.

That the plaintiff Phyllis Stanger suffered and sustained as a result of the derailment proximately caused by and due to the negligence and carelessness of the defendant, its agents, servants and employees, severe and permanent injuries that have caused,

since the time of the accident and will continue to cause her nervousness and physical suffering and discomfort so long as she may live. She [20] has suffered and sustained the permanent loss of a natural gift by the removal of her uterus by reason of the injuries she received at the time the accident occurred, thereby making her sterile. That the sum of \$19,000.00 is a reasonable sum for said injuries.

XV.

At the close of all of the evidence the defendant moved for a directed verdict, in both consolidated cases.

CONCLUSIONS OF LAW

The court concludes as a matter of law from the foregoing findings of fact:

I.

That the motion of the defendant for a directed verdict in case No. 1148, being Albert G. Stanger vs. Union Pacific Railroad Company, a Corporation, is granted. Defendant's motion for a directed verdict in case No. 1149, being Albert G. Stanger and Phyllis Stanger, plaintiffs, vs. Union Pacific Railroad Company, a corporation, defendant, is denied.

II.

That the defendant Union Pacific Railroad Company, a corporation, its agents, servants and employees while acting within the line, course and

scope of their employment were guilty of negligence and carelessness proximately causing and contributing to the injuries received by the plaintiff Phyllis Stanger and failed to exercise that degree of care, maintenance, and prudence and foresight in the inspection, management, and operation of its passenger equipment under the facts and circumstances of this case, that the law requires, and that the law did require of the defendant, its agents, servants and employees at the time and place the within accident occurred. That the defendant, its agents, servants and employees failed to exercise that degree of care, prudence, maintenance and foresight that the law requires of those engaged as common carriers by rail of said passengers on passenger trains as was the defendant in this case. [21]

III.

That as a matter of law the plaintiffs Albert G. Stanger and Phyllis Stanger in case No. 1149 are entitled to recover damages for the injuries and losses received by reason of the derailment or accident due to and occasioned by the negligence and carelessness of the defendant, its agents, servants and employees.

IV.

And under the facts made and herein found the sum of Nineteen Thousand Dollars (\$19,000.00) is lawful, reasonable and just as the amount which the plaintiffs should receive herein in case No. 1149.

Done at Boise, Idaho this 24th day of December, 1941.

CHARLES C. CAVANAH,
District Judge.

[Endorsed]: Filed Dec. 24, 1941. [22]

In the District Court of the United States, in and
for the District of Idaho, Eastern Division

No. 1149

ALBERT G. STANGER and
PHYLLIS STANGER,

Plaintiffs,

vs.

UNION PACIFIC RAILROAD COMPANY, a
corporation,

Defendant.

JUDGMENT.

This cause having been heard before the Court without the intervention of a jury and the Court having heretofore made its findings of fact and conclusions of law, and filed the same herein;

It Is Therefore, Upon the Findings and Order of the Court, Ordered, Adjudged and Decreed that the plaintiffs, Albert G. Stanger and Phyllis Stanger, in case No. 1149, do have and recover of and from the defendant Union Pacific Railroad Company, a cor-

poration, the sum of Nineteen Thousand Dollars (\$19,000.00), lawful money of the United States of America, and costs of suit taxed at \$23.45. And that execution is awarded for the collection of this judgment.

Witness the Honorable Charles C. Cavanah, Judge of said court, and the seal thereof this 24th day of December, 1941.

(Seal)

W. D. McREYNOLDS,

Clerk, U. S. District Court.

[Endorsed]: Filed December 24, 1941. [23]

[Title of District Court and Cause.]

OBJECTIONS TO FINDINGS AND MOTION
TO AMEND FINDINGS AND CONCLU-
SIONS OF LAW

Comes now the defendant (at the time it serves and files its motion for new trial) and objects to the findings of fact and conclusions of law signed and filed in the above entitled cause, and moves the court to amend said findings, to make additional findings, and to make and enter judgment in favor of the defendant accordingly.

I.

Defendant moves the court to strike from the 11th line of paragraph V of said findings the words "and violently"; to strike from line 12 of said paragraph the words "the lower portion of"; to

strike from line 14 of said paragraph the words “with great force and violence”; to strike from the 15th and 16th lines of said paragraph the words “severely and permanently injuring her internally and”, for the reason that the evidence is insufficient to support the above quoted portions of said findings. Defendant moves to amend said paragraph V by adding thereto the following facts, which facts are undisputed and are material, to-wit: —“from the top of the seat to the top of the table, free height, 10 $\frac{1}{4}$ inches; from back of seat to back of seat, 57 $\frac{1}{2}$ inches; that the seat and back rests of the seat are all cushioned.”

II.

The defendant moves the court to strike from line 7 of paragraph VI of said findings the words “solid or” and to strike from line 8 of said paragraph the words “sudden violent” and to strike [24] from lines 13, 14, 15 and 16 the following: “and the trucks that had been underneath the said standard Pullman car were out from under said Pullman car when it came to a final stop”, for the reason that the evidence is insufficient to support the above quoted portions of said findings.

III.

Defendant moves the court to strike paragraph VII of said findings, and the whole thereof, for the reason that the evidence is insufficient to support said finding, and to substitute in place thereof the

following, for the reason that the evidence will support no other finding:

“That the plaintiff Phyllis Stanger, at the time of the derailment on January 14, 1940 at Houston, Colorado, was approximately 28 years of age, and was the mother of three young children, the birth of which successively was attended by her family physician, Dr. Mellor; that since the birth of the last child about March 1939 she had excessive menstruation and other symptoms of a fibroid uterus; that she went to Dr. Woolley at Idaho Falls on the 10th day of November, 1939, for treatment because of said excessive menstruation, at which time her blood count showed hemoglobin 42%; that said treatments consisted of injections to decrease the flow and that the latter part of the month her hemoglobin had raised to 56% and she felt better, said treatments were continued until December 14, 1939; that at the time of the derailment of the train on the 14th day of January, 1940, the said plaintiff was struck in the abdomen well above the pelvic cavity by the card table at which she was seated, but that there was no evidence of any injury, although said plaintiff commenced to flow thereafter; that said plaintiff and her husband and friends rode from the point of the derailment to the City of Denver, Colorado, in an automobile, where the said plaintiff and others were met by friends and later in the day a doctor treated said plaintiff, but how or of what the treat- [25] ments consisted, or what the disclosures of said Phyllis

Stanger to said physician were, or what the examination or diagnosis, if any, disclosed, is not in evidence; that thereafter and later in the day the said plaintiff and her husband went to the Horse Show and later returned to the Denver Athletic Club for dinner, after which the said plaintiff and her husband traveled by train to Houston, Texas, and there attended a Convention for several days, following which said plaintiff and her husband traveled by train to Mexico City, Mexico, where they went for a pleasure trip and stayed for three or four days seeing the sights; said plaintiff and her husband then returned to Idaho Falls by train via Los Angeles, California, and arrived at Idaho Falls, Idaho on or about the 29th day of January, 1940; that said plaintiff went to bed upon her return to Idaho Falls but had no medical treatment from the time she left Denver on the 14th day of January, 1940 until the 12th day of February, 1940; that on her return to Idaho Falls, or thereafter, she did not consult Dr. Woolley, who had been treating her prior to the time of the derailment, or Dr. Mellor, her family physician, but on the latter date consulted Dr. Hatch at Idaho Falls, Idaho, who found her hemoglobin to be 48%, and who treated her and who operated on her on the 9th day of July, 1940; that Dr. Hatch's preoperative diagnosis was chronic cervicitis and fibrosis uterus, and said surgical operation confirmed said preoperative diagnosis and consisted of conization of the cervix and a subtotal hysterectomy, and the re-

moval of the right ovary; that the pathological diagnosis of the removed organs and parts of organs was, 'Fibrosis uteri with diffuse endometrial hyperplasia, and chronic fibrous cervicitis and multiple follicular cysts of the ovary with corpus hemorrhagicum'; that said plaintiff Phyllis Stanger left the hospital on the 20th day of July, 1940, and her condition continued to improve and the flowing stopped upon said operation being performed; that said operation resulted in making her sterile, but that other treatments for her chronic condition [26] might also have made her sterile; that the removal of her uterus by said operation was necessary in order to stop or correct the flowing of blood from her uterus but that the condition of said uterus and the other organs removed by said operation was not caused by any injuries the said plaintiff Phyllis Stanger received at the time said derailment occurred, and that said removed organs were not injured as a result of said derailment; that the said plaintiff's excessive flowing was due to a chronic condition from which she was suffering prior to the time of the derailment and which only a surgical operation such as Dr. Hatch performed, or possibly radium or x-ray treatment, could cure; that said operation performed by Dr. Hatch did cure her condition; that any aggravation of said plaintiff's condition by reason of said derailment related solely to an aggravation of her pre-existing symptoms of the fibroid uterus and that such aggravation

would have been of a temporary duration and would not have existed for more than three or four days if the said plaintiff had gone to bed for a few days following the derailment, but that the said plaintiff did not do so or otherwise exercise the care for herself that she should have in view of the excessive flowing she complained about following the derailment.

IV.

Defendant moves the court to strike paragraph VIII of said findings, and the whole thereof, for the reason that said finding is immaterial and the evidence is insufficient to support said finding, the evidence being clear and uncontradicted that before the plaintiff Phyllis Stanger started on her said trip by train and prior to January 14, 1940, she had been flowing abnormally for an excessive length of time and that her condition subsequent to the said 14th day of January, 1940 was merely a continuation of said pre-existing condition for which a surgical operation or possibly radium or x-ray was the only cure, and for which Dr. Hatch did operate on the 9th day of July, 1940, and that after removing her uterus, or the part thereof that was fibroid, and which uterus was not injured at the [27] time of the derailment, the said flowing ceased and the trouble from which she was suffering prior and subsequent to the derailment, was cured.

Defendant in any event moves the court to strike from said paragraph VIII the following words:

“and as a result of the injuries received in said accident”, for the reasons set forth immediately above.

V.

Defendant moves to strike paragraph IX of said findings and the whole of said paragraph on the ground that the evidence is insufficient to support said findings and for the reasons set forth in paragraphs III and IV of this motion, and for the reason that said paragraph contains only conclusions of law and not statements of fact, and requests the court in lieu thereof to adopt, make and enter the following finding, to-wit:

“That on the 13th day of January, 1940, the day prior to the time the derailment occurred at Houston, Colorado, the section foreman of the defendant inspected the road bed, the track, including the switch and the frog, at the point said derailment occurred; that said railroad track was constructed upon a roadbed with a base of Sherman Hill gravel 8 to 10 inches in depth upon which was placed good and substantial ties and upon which there was laid rail of the 110 pound type, that each tie had tie plates on them and each tie plate was spiked to the rail and the ties; that said track was properly gauged and said track and road bed was in safe condition and was a portion of the main line track between Omaha, Nebraska and Denver, Colorado; that after said inspection was made there were numerous trains operated successfully over said

track up to the time the train in question was derailed; that said train approached and passed over said east switch of the track at Houston, Colorado at a speed of approximately 60 or 65 miles per hour, which was the usual and customary speed of said train; that said engine rode smoothly all the time and when said engine was some distance east of said switch the engineer [28] observed the emergency brakes of the train applied and upon looking back saw that the train had parted or broken in two, that several cars in the rear of the train were derailed but that the engine and four cars attached thereto were not derailed but stayed on the track; that the cars attached to said engine were inspected and no parts thereof were missing and all equipment underneath said cars were found to be intact except that the right rear wheel of the fourth car behind the engine and the last car back of the engine which was not derailed was broken and only a core of the wheel remained on the axle; that the broken parts of said wheel were found at various places east of the east switch and frog of the switch, and that said broken parts and the core of the wheel remaining on the axle established that all breaks were fresh, new and clean; that on the top of the right hand rail and about 20 feet east of the frog of the east switch there were two gouge marks and a short distance east thereof a rail or two was turned over and bent; that plaintiffs were riding in a standard Pullman car, which was the seventh or next to last car in

the train; that the broken parts of said wheel were picked up by defendant's employees and together with the core of the wheel left on the axle were immediately shipped to the Metallurgical Department of the laboratory of the defendant at Omaha, Nebraska, where all of said parts were inspected and the wheel carefully tested and analyzed both chemically and metallurgically, the result of which showed that chemically the wheel was well within the standards set up by all Class I railroads of the United States; that the metallurgical test established that said wheel broke because of internal stresses existing in the plate of said wheel; that said stresses are caused at the time said wheel is manufactured and that the only known test of determining such stresses is to saw through the wheel, as was done by the metallurgical engineer of the defendant when he tested said broken wheel; that the breaking of said wheel was the cause of said rails turning over and the consequent derailment of the train on which plaintiffs were riding on the 14th day of January, 1940; [29] that there is no test or inspection known except that test made by the metallurgical engineer which will disclose the stresses or condition which caused said wheel to break and that no human foresight or experience could have foreseen said condition and no inspection of said wheel prior to the time it broke at Houston, Colorado on the 14th day of January, 1940 would have disclosed said condition and that said condition of the wheel could not have been discovered

by the defendant or any of its agents, servants or employees in the exercise of the highest degree of care prior to the time said wheel broke at Houston, Colorado on the 14th day of January, 1940; that said wheel was a rolled steel wheel and that there are thousands of wheels of the same kind now, and for a long time past have been, in operation on all the Class I railroads in the United States and on the defendant's line of railroad, and that in the past 39 years there has been but two wheels break from the latent condition which caused the wheel in question to break.

VI.

Defendant objects to paragraph XI of said findings for the reason that the evidence is insufficient to support said finding; for the reason that the surgical operation performed upon the said Phyllis Stanger was not the result of injuries sustained by her in the derailment of defendant's train on the 14th day of January, 1940 but was for the purpose of correcting a condition existing prior to the time said derailment occurred, and for the further reason that said finding is indefinite in that it is not stated what amounts the plaintiffs incurred by way of expenditures, for which reason defendant moves the court to strike said finding in its entirety.

VII.

Defendant objects to and moves the court to strike paragraph XII of said findings in its en-

tirety for the reason that said paragraph contains no finding of any fact or facts but presents only a conclusion of law, is argumentative, redundant and immaterial.

VIII.

Defendant objects to and moves the court to strike para- [30] graph XIII of said findings in its entirety for the reason that said paragraph contains no findings of any fact or facts but presents only a conclusion of law, is argumentative, redundant and immaterial.

IX.

Defendant objects to and moves the court to strike paragraph XIV of said findings, and the whole thereof, for the reasons mentioned in paragraphs III, IV and V of said motion, and for the further reason that said finding is contrary to the undisputed or great weight of the evidence, and for the reason that the evidence is insufficient to support the findings therein contained; that the amount stated therein in any event is grossly excessive for the reason that the undisputed evidence shows that any aggravation which might have been caused by the derailment was merely an aggravation of the symptoms of the pre-existing condition of the plaintiff Phyllis Stanger, which aggravation would have been of slight consequence and for only a few days duration if she had exercised reasonable care for her own health and physical welfare, and

rested at Denver instead of foregoing rest or quiet upon arriving at said place, and thence immediately continuing on her journey to Houston, Texas, thence to Mexico City, sightseeing and returning to Idaho Falls via Los Angeles, California, and thereafter failing to consult a physician until approximately fourteen days after her arrival at Idaho Falls.

X.

Defendant moves the court to amend paragraph XV of said findings by striking all of said paragraph and substituting in place thereof the following:

“At the close of all of the evidence the defendant moved for judgment in its favor as to both consolidated cases upon the ground that the evidence is insufficient to sustain a recovery by either or both of the plaintiffs.”

for the reason that the record will support no other finding. [31]

XI.

Defendant objects to and moves the court to amend conclusion of law No. 1 to read as follows: “That the motion of the defendant for judgment in its favor in case No. 1148, being Albert G. Stanger, plaintiff, vs. Union Pacific Railroad Company, a corporation, defendant, and in case No. 1149, being Albert G. Stanger and Phyllis Stanger, plaintiffs, vs. Union Pacific Railroad Company, a corporation, defendant, should be granted.”, for the reason that

under the facts in this case the law will support no other conclusion.

XII.

Defendant objects to and moves the court to strike conclusions of law II, III and IV, for the reason that said conclusions are contrary to the law and the evidence is insufficient to support them and each of them, and requests the court to adopt, make and enter in lieu thereof the following conclusions:

“a. That the plaintiff Albert G. Stanger was not injured as a result of the derailment of defendant’s train at Houston, Colorado on the 14th day of January, 1940; that the injuries the plaintiff Phyllis Stanger sustained at the time the train derailed did not cause or produce the condition which necessitated the surgical operation performed by Dr. Hatch on July 9th, 1940, but that any condition caused by said derailment was only a temporary aggravation of the symptoms of her pre-existing condition for which an operation was the only cure, and that said temporary aggravation would have existed for not to exceed three or four days had the said plaintiff rested for that length of time instead of continuing on her journey, but that the cause of said operation was the existence of a chronic disorder from which she was suffering before embarking upon said journey.”

“b. That the derailment of the train upon which the plaintiffs were riding and which derailed at Houston, Colorado on the 14th day of January, 1940, was caused by a wheel on the right rear [32] trucks of the fourth car behind the engine of the train breaking, which wheel broke as the train was passing over the track in the immediate vicinity of the east switch and frog from internal stresses existing in the plate of said wheel, which stresses were latent and could not have been discovered by any known test, human foresight or experience, prior to said wheel breaking at Houston, Colorado, on the day in question, and such latent defect or condition could not have been discovered by defendant’s agents, servants or employees by the exercise of the highest degree of care prior to the time the wheel broke at Houston, Colorado on the day in question.”

“c. That the defendant rebutted the prima facie case made by the plaintiffs and the plaintiffs did not produce any further evidence of any negligence on the part of the defendant and accordingly the defendant was not negligent and is entitled to judgment in its favor and against the plaintiffs and each of them in cases 1148 and 1149.”

Said motion will be based upon the pleadings, files, records, minutes, testimony and other evidence in the case.

Dated at Pocatello, Idaho, December 30th, 1941.

GEO. H. SMITH,

H. B. THOMPSON,

L. H. ANDERSON,

Attorneys for Defendant.

Service and receipt of copy of the foregoing Objections to Findings and Motion to Amend Findings and Conclusions of Law is hereby admitted this 30th day of December, 1941.

JOHN FEREBAUER,

CLYDE BOWEN,

W. H. WITTY,

Attorneys for Plaintiffs.

[Endorsed]: Filed Dec. 31, 1941. [33]

[Title of District Court and Cause.]

ORDER

The objections of the defendant to the findings, and the motion to amend findings and conclusions of law, having been presented and after consideration of the same it is Ordered:

1. Objection to paragraph 5 of the findings is overruled excepting the request to strike from line 12 of said paragraph "the lower portion of" and inserting in lieu thereof "her in"

2. The motion to strike from paragraph 6 of the findings "and the trucks that had been underneath

said standard pullman car were out from under said pullman car when it came to a final stop" be sustained and the remaining portion of the motion relating to paragraph 6 is denied.

3. The motion to strike from paragraph 7 of the findings is denied, excepting the words on line 4 from the beginning of said paragraph "the lower portion of",

4. The motion to strike paragraphs 8, 9, 11, 12, 13 and 14 of the findings is denied.

5. The motion to strike paragraph 15 of the findings is denied, but said paragraph 15 of the findings is modified by inserting therein "as to both consolidated cases".

The objections and motion to amend the conclusions of law are denied.

Exception allowed defendant.

Dated January 23, 1942.

CHARLES C. CAVANAH
United States District Judge.

[Endorsed]: Filed January 23, 1942. [34]

[Title of District Court and Cause.]

ORDER

It is further ordered that paragraph 7 of the findings of fact be amended by striking the word "two" on line 4 from the bottom thereof and insert

in lieu thereof the word "three".

Dated January 23, 1942.

CHARLES C. CAVANAH
United States District Judge

[Endorsed]: Filed January 23, 1942. [35]

[Title of District Court and Cause.]

PETITION AND MOTION FOR
NEW TRIAL

Comes now the defendant Union Pacific Railroad Company, a corporation, and moves the court for an order setting aside judgment rendered herein and granting a new trial, on the following grounds:

I.

Insufficiency of the evidence to justify the decision, and that it is against law in this, to-wit:

That the evidence is insufficient to support the finding and conclusion of law that the defendant, its agents, servants and employees were guilty of negligence and carelessness in failing to exercise that degree of care, maintenance, prudence and foresight in the inspection, management and operation of its passenger equipment that the law requires and that the train upon which the plaintiff Phyllis Stanger was riding was derailed as a consequence thereof, for the reasons that:

a. The evidence establishes without dispute that the railroad roadbed and the track laid thereon was good and substantial, properly maintained, not de-

fective in any manner, and neither the roadbed nor track contributed in any manner to the derailment of the train.

b. The evidence establishes without dispute that the sole cause of the derailment was a broken wheel on the rear of the fourth car behind the engine of the train which caused the four rear cars or the four cars behind the one on which the wheel broke to be de- [36] railed; that said wheel broke from internal stresses existing in the plate of the wheel, which stresses or defects were latent and could not have been discovered by any kind of inspection prior to the time the wheel broke and that the breaking of said wheel could not have been guarded or protected against by human foresight or skill or the latent defect discovered by any known test prior to the time said wheel broke at Houston, Colorado, January 14, 1940.

c. That the evidence is insufficient to establish that the derailment alleged in the complaint was the cause of the continued excessive flowing of Mrs. Stanger which the operation was performed to cure and did cure. That it appears from the opinion of the court herein rendered December 6, 1941 and from the findings of fact and conclusions of law subsequently made by the court that the court has awarded damages to Phyllis Stanger and to her husband for all of the ailments, and consequences thereof, from which the said Phyllis Stanger was suffering at the time of the operation performed on her on July 19, 1940, which embraced a condition

of excessive flowing which had existed at least from the time of the birth of child in March, 1939, which said excessive flowing was caused by chronic cervicitis and fibrosis uterus, which said condition according to the undisputed testimony could not be caused and was not caused by any external violence or from any cause arising out of the derailment of the train upon which the said Phyllis Stanger was riding at the time alleged in her complaint, but which was a condition which arose following child birth; that said condition originated prior to the time of the derailment alleged in the complaint and was chronic and had not been cured and that the operation which was performed upon said Phyllis Stanger, consisting of removal of the uterus, one of the ovaries and part of the cervix, was performed for the purpose of and necessary to cure said chronic condition which existed prior to the time of said derailment, and that the subsequent inability of said Phyllis Stanger to bear children was caused by the act of her physician or surgeon in operating upon [37] her to cure a condition of fibrosis uterus and chronic cervicitis existing before said derailment and that said operation was not caused by any injury sustained by the said Phyllis Stanger in the derailment alleged in said plaintiff's complaint, but the court in arriving at an award of \$19,000.00, for which judgment has been entered, assessed heavy damages against the defendant for the aforesaid ailments, infirmities and chronic condition and the consequences of the operation necessitated thereby,

indistinguishably embracing such award with such injuries for damages, if any, as said Phyllis Stanger sustained in the derailment or would have sustained if she had exercised reasonable care for the protection of her health and diminution of damages following said derailment, which said injuries, both nervous and physical, would have been but slight and of temporary duration if the said Phyllis Stanger had so conducted herself. That the defendant is not liable or answerable in damages for any consequences resulting from impairment of the said plaintiff Phyllis Stanger's health or physical disorders from which she was suffering prior to the time of said derailment or of any operation which was necessary for the purpose of curing or correcting such disorders or impairment of health, but that the court by its decisions and findings and judgment has awarded and assessed damages against the defendant therefor. That because of this error committed by the court the evidence is insufficient to justify the foregoing decision and it is against law.

II.

Excessive damages appearing to have been given under the influence of passion and prejudice for the reasons set forth under the heading of "insufficiency of the evidence" more fully stated in paragraph numbered I preceding, and in this, to-wit:

That the court by its decision and findings and judgment has awarded to said Phyllis Stanger dam-

ages on account of a chronic condition of permanent excessive flowing which existed [38] prior to and independent of the derailment which occurred at Houston, Colorado, January 14, 1940, and for the permanent cure of which an operation was necessary and was performed and which caused said Phyllis Stanger to be sterile, for all of which the defendant has been charged in said judgment.

III.

Errors in law occurring at the trial as follows:

a. The court erred in denying the defendant's motion for judgment, and in rendering judgment in favor of the plaintiffs Phyllis Stanger and Albert G. Stanger against the defendant.

b. The court erred in holding and finding that upon the evidence in the case, the derailment, and the injuries of Phyllis Stanger, were due to the negligence of the defendant.

c. The court erred in holding and finding that Phyllis Stanger was thrown violently against a card table, and in holding and finding that the lower portion of her abdomen struck against said table, and in holding and finding that she was thereby severely and permanently injured internally.

d. The court erred in holding and finding that said Phyllis Stanger was in "reasonably good health prior to the accident".

e. The court erred in holding and finding that the operation which was performed by Dr. Hatch

on Phyllis Stanger in July, 1940, was because of the injuries received by her in the derailment, or that said operation was caused thereby.

f. The court erred in holding and finding that excessive flowing caused by the derailment and the removal of the uterus of Phyllis Stanger made Phyllis Stanger sterile, and in holding and finding that "the nervous shock and all of the personal injuries suffered and received by the said plaintiff Phyllis Stanger in said accident were due to and proximately caused by the negligence and carelessness of the defendant, its agents, servants and employees."

g. The court erred in holding and finding that said Phyllis [39] Stanger sustained permanent injuries as a result of the derailment, or that she will continue to suffer nervously and/or physically in consequence thereof as long as she may live.

h. The court erred in failing, in rendering judgment, to take into account that Phyllis Stanger had an established or chronic condition or disorder of her uterus and other related organs which was the basic cause of her operation, and which it was necessary to operate upon to cure, and that the defendant could not be charged therewith, but, at most, was chargeable only with such aggravation, if any, as would have resulted if following the derailment she had exercised the degree of care that she was bound in law to do.

i. The court erred in making an award and rendering judgment for an amount which included

compensation *fo* the plaintiffs for a chronically impaired physical condition of the said Phyllis Stanger existing prior to the time of the derailment and the operation performed to correct or cure said pre-existing disorder and the consequences resulting therefrom.

Said petition and motion are based and will be made upon all of the records, files, pleadings and proceedings in said action, including the opinion, findings of fact, conclusions of law and judgment, and upon the minutes of the court as stated and defined in Rule 50 of the Rules of Practice of this court, which embraces the Reporter's transcript of his notes in said cause.

GEO. H. SMITH,
H. B. THOMPSON,
L. H. ANDERSON,

Attorneys for Defendant.

Service and receipt of copy of the foregoing petition and motion for new trial is hereby admitted this 30th day of December, 1941.

JOHN FEREBAUER,
CLYDE BOWEN,
W. H. WITTY,

Attorneys for Plaintiff.

[Endorsed]: Filed December 31, 1941. [40]

[Title of District Court and Cause.]

ORDER

In harmony with the memorandum opinion filed in this cause on this date, it is Ordered that the motion of the defendant for a new trial be and the same hereby is denied.

Exception allowed.

Dated January 23, 1942.

CHARLES C. CAVANAH
United States District Judge

[Endorsed]: Filed January 23, 1942. [41]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the Union Pacific Railroad Company, a corporation, the above named defendant, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from that certain final judgment, and the whole thereof, made and entered in the above entitled court and cause on the 24th day of December, 1941, which said judgment was in favor of the plaintiffs herein and against the defendant.

Dated, this 31st day of January, 1942.

GEO. H. SMITH,

Attorney for Defendant, Re-
siding at: Salt Lake City,
Utah.

H. B. THOMPSON,

L. H. ANDERSON,

Attorneys for Defendant, Re-
siding at: Pocatello, Idaho.

[Endorsed]: Filed January 31, 1942. [42]

[Title of District Court and Cause.]

PETITION FOR APPROVAL OF SUPER-
SEDEAS AND STAY ON APPEAL.

Comes now the Union Pacific Railroad Company, a corporation, the above named defendant and appellant, and represents as follows:

That judgment was entered in the above entitled court and cause on the 24th day of December, 1941, in favor of Albert G. Stanger and Phyllis Stanger, plaintiffs, and against the Union Pacific Railroad Company, a corporation, defendant, for the sum of Nineteen Thousand (\$19,000.00) Dollars, and costs of suit taxed at Twenty-Three and 45/100 (\$23.45)Dollars; that said defendant has appealed from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and desires the court to fix the amount of a Supersedeas Bond, approve the form thereof, and also approve

the Continental Casualty Company, a corporation, as surety, and thereupon order a stay of proceedings according to law.

Now, Therefore, Petitioner prays that the court fix the amount of said supersedeas bond, approve the bond tendered herewith, and the surety thereon, and order a stay according to law.

Dated, this 31st day of January, 1942.

GEO. H. SMITH,

Attorney for Defendant, Re-
siding at Salt Lake City,
Utah.

H. B. THOMPSON,

L. H. ANDERSON,

Attorneys for Defendant, Re-
siding at Pocatello, Idaho.

[Endorsed]: Filed January 31, 1942. [43]

[Title of District Court and Cause.]

ORDER APPROVING BOND AND GRANTING
A STAY OF EXECUTION

The defendant, Union Pacific Railroad Company, a corporation, having this day filed its Notice of Appeal from the judgment rendered in the above entitled cause in favor of the plaintiffs Albert G. Stanger and Phyllis Stanger and against the defendant Union Pacific Railroad Company, a corporation, to the United States Circuit Court of

Appeals for the Ninth Circuit, and having filed its petition for an order fixing the amount of a supersedeas bond and approving the bond tendered by said appellant and the surety executing the same, and granting said stay of proceedings.

Now, Therefore, It Is Hereby Ordered, that the amount of said supersedeas bond be fixed in the sum of Twenty Thousand (\$20,000.00) Dollars, and the bond tendered by the said Union Pacific Railroad Company, a corporation, in said sum with the Continental Casualty Company, a corporation, as surety, be and the same is hereby in all respects approved and that all proceedings herein for the collection of said judgment be and they are hereby stayed according to law.

Dated, this 31st day of January, 1942.

CHARLES C. CAVANAH

District Judge

[Endorsed]: Filed January 31, 1942. [44]

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men By These Presents, That we, the Union Pacific Railroad Company, a corporation, as principal, and Continental Casualty Company, a corporation organized under the laws of the State of Indiana and authorized to transact the business of acting as sole surety upon bonds and undertak-

ings in the State of Idaho, as surety, are held and firmly bound unto Albert G. Stanger and Phyllis Stanger in the full and just sum of Twenty Thousand Dollars (\$20,000.00), lawful money of the United States of America, to be paid to the said Albert G. Stanger and Phyllis Stanger, their heirs, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our and each of our successors or assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 31st day of January, 1942.

Whereas, lately in the District Court of the United States for the District of Idaho, Eastern Division, in a suit pending in said court between Albert G. Stanger and Phyllis Stanger, as plaintiffs, and the Union Pacific Railroad Company, a corporation, as defendant, a judgment was rendered in favor of the plaintiffs and against said defendant in the sum of Nineteen Thousand (\$19,000.00) Dollars, and bearing interest at the rate of 6% per annum from the date hereof, to-wit: on the 24th day of December, 1941, with [45] costs amounting to the sum of \$23.45, and said Union Pacific Railroad Company, a corporation, having filed in said court a Notice of Appeal to reverse said judgment in the aforesaid suit on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, at a session of said Circuit Court of Appeals to be held at San Francisco, in the State of California.

Now, the condition of the above obligation is such, that if the said Union Pacific Railroad Company, a corporation, shall prosecute said appeal to effect, and satisfy the said judgment in full, together with costs, interest and damages for delay if for any reason the appeal is dismissed or the judgment is affirmed, and shall satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award against it, then the above obligation to be void; otherwise to remain in full force and virtue.

UNION PACIFIC RAILROAD
COMPANY, a corporation,

By L. H. ANDERSON,

One of its Attorneys of Record,
Residing at Pocatello,
Idaho,

Principal.

[Seal]

CONTINENTAL CASUALTY
COMPANY, a corporation,

By A. B. CHASE,

Its Attorney-in-Fact,

Surety.

A. B. CHASE,

Resident Agent.

The foregoing Bond is approved as to sufficiency, form and surety, and is allowed as a Supersedeas this 31st day of January, 1942.

CHARLES C. CAVANAH

District Judge [46]

Continental Casualty Company
Chicago

CERTIFICATE OF AUTHORITY
INDIVIDUAL ATTORNEY-IN-FACT

Know All Men By These Presents, That The Continental Casualty Company, a corporation duly organized under the laws of the State of Indiana, and having its general office in the City of Chicago, and State of Illinois, hath made, constituted and appointed, and does by these presents make, constitute and appoint A. B. Chase of Pocatello, Idaho, its true and lawful Attorney-in-Fact with full power and authority hereby conferred to sign, seal and execute in its behalf bonds, undertakings and other obligatory instruments of similar nature as follows:

Any and all Fidelity and Surety bonds in penalty not exceeding Five Hundred Thousand Dollars (\$500,000.00) behalf Union Pacific Railroad Company or its subsidiary or affiliated companies.

and to bind The Continental Casualty Company thereby as fully and to the same extent as if such instruments were signed by the duly authorized officers of The Continental Casualty Company and all the acts of said Attorney, pursuant to the authority hereby given are hereby ratified and confirmed.

This Power of Attorney is made and executed pursuant to and by authority of the following By-Law adopted by the Board of Directors of the

Company at a meeting duly called and held on the 6th day of January, 1937.

“Article XI—Surety Bonds and
Undertakings.

Section 2. Appointment of Attorney-in-Fact. The President or any Vice President may, from time to time, appoint by written certificates Attorneys-in-Fact to act in behalf of the Company in the execution of policies of insurance, bonds, undertakings and other obligatory instruments of like nature. Such Attorneys-in-Fact, subject to the limitations set forth in their respective certificates of authority shall have full power to bind the Company by their signature and execution of any such instrument and to attach the seal of the Company thereto. The President or any Vice President or the Board of Directors may at any time revoke all power and authority previously given to any Attorney-in-Fact.”

In Witness Whereof, The Continental Casualty Company has caused these presents to be signed by its Vice President and its corporate seal to be hereto affixed this 17th day of July, 1941.

CONTINENTAL CASUALTY
COMPANY

By ROY TUCHBREITER

[Seal]

Vice President

State of Illinois,
County of Cook—ss.

On this 17th day of July, 1941, before me personally came Roy Tuchbreiter, to me known, who being by me duly sworn, did depose and say: that he resides in the City of Chicago, State of Illinois; that he is a Vice President of the Continental Casualty Company, the corporation described herein and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the foregoing instrument is such corporate seal; that it was so affixed pursuant to authority given by the Board of Directors of said corporation and that he signed his name thereto pursuant to like authority, and acknowledges same to be the act and deed of said [47] corporation.

[Notarial Seal]

H. McCRILLUS,
Notary Public.

My Commission expires April 9, 1944.

CERTIFICATE

I, A. B. Hvale Assistant Secretary of the Continental Casualty Company, do hereby certify that the attached Power of Attorney dated July 17, 1941 in behalf of A. B. Chase is a true and correct copy and that same is still in force.

In testimony whereof I have hereunto subscribed my name and affixed the corporate seal of the said Company this 31st day of January, 1942.

[Seal]

A. B. HVALE,
Assistant Secretary.

[Endorsed]: January 31, 1942. [48]

[Title of District Court and Cause.]

COST BOND ON APPEAL.

Know All Men by These Presents:

That we, the Union Pacific Railroad Company, a corporation, as principal, and Continental Casualty Company, a corporation organized under the laws of the State of Indiana and authorized to transact the business of acting as sole surety upon bonds and undertakings in the State of Idaho, as surety, are held and firmly bound to Albert G. Stanger and Phyllis Stanger, the plaintiffs and appellees in the above entitled cause, in the full and just sum of Two Hundred Fifty (\$250.00) Dollars, to which payment well and truly to be made we bind ourselves and our and each of our successors or assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 31st day of January, 1942.

Whereas, on the 24th day of December, 1941, in the District Court of the United States for the District of Idaho, Eastern Division, in a suit pending in that court, wherein Albert G. Stanger and Phyllis Stanger were plaintiffs, and the Union Pacific Railroad Company, a corporation, was defendant, a judgment was rendered against said defendant in the sum of Nineteen Thousand (\$19,000.00) Dollars, with interest and costs, and said defendant [49] having filed in the office of the Clerk of said District Court a Notice of Appeal to the United

States Circuit Court of Appeals for the Ninth Circuit.

Now, the condition of this obligation is such, that if said Union Pacific Railroad Company, a corporation, the appellant, shall prosecute said appeal and pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as the appellate court may award if the judgment be modified, then the above obligation is void, otherwise to remain in full force and effect.

UNION PACIFIC RAILROAD
COMPANY, a corporation,

By L. H. ANDERSON,

One of its Attorneys, of Record,
Residing at Pocatello,
Idaho.

Principal

(Seal)

CONTINENTAL CASUALTY
COMPANY, a corporation,

By A. B. CHASE,

Its Attorney-in-Fact
Surety.

A. B. CHASE,

Resident Agent. [50]

Continental Casualty Company,
Chicago

**CERTIFICATE OF AUTHORITY
INDIVIDUAL ATTORNEY-IN-FACT**

Know All Men by These Presents, That the Continental Casualty Company, a corporation duly organized under the laws of the State of Indiana, and having its general office in the City of Chicago, and State of Illinois, hath made, constituted and appointed, and does by these presents make, constitute and appoint A. B. Chase of Pocatello, Idaho its true and lawful Attorney-in-Fact with full power and authority hereby conferred to sign, seal and execute in its behalf bonds, undertakings and other obligatory instruments of similar nature as follows:

Any and all Fidelity and Surety bonds in penalty not exceeding Five Hundred Thousand Dollars (\$500,000.00) behalf Union Pacific Railroad Company or its subsidiary or affiliated companies, and to bind the Continental Casualty Company Thereby as fully and to the same extent as if such instruments were signed by the duly authorized officers of The Continental Casualty Company and all the acts of said Attorney, pursuant to the authority hereby given are hereby ratified and confirmed.

This Power of Attorney is made and executed pursuant to and by authority of the following By-Law adopted by the Board of Directors of the Company at a meeting duly called and held on the 6th day of January, 1937.

“Article XI—Surety Bonds and Undertakings.

Section 2. Appointment of Attorney-in-Fact. The President or any Vice President may, from time to time, appoint by written certificates Attorneys-in-Fact to act in behalf of the company in the execution of policies of insurance, bonds, undertakings and other obligatory instruments of like nature. Such Attorneys-in-Fact, subject to the limitations set forth in their respective certificates of authority shall have full power to bind the Company by their signature and execution of any such instrument and to attach the seal of the Company thereto. The President or any Vice-President or the Board of Directors may at any time revoke all power and authority previously given to any Attorney-in-Fact.”

In Witness Whereof, The Continental Casualty Company has caused these presents to be signed by its Vice President and its corporate seal to be hereto affixed this 17th day of July, 1941.

(Seal)

CONTINENTAL CASUALTY
COMPANY,
By ROY TUCHBREITER,
Vice President

State of Illinois,
County of Cook—ss.

On this 17th day of July, 1941, before me personally came Roy Tuchbreiter, to me known, who

being by me duly sworn, did depose and say: that he resides in the City of Chicago, State of Illinois; that he is a Vice President of the Continental Casualty Company, the corporation described herein and which executed the above instrument that he knows the seal of said corporation; that the seal affixed to the foregoing instrument is such corporate seal; that it was so affixed pursuant to authority given by the Board of Directors of said corporation and that he signed his name thereto pursuant to like authority, and acknowledges same to be the act and deed of said corporation.

(Notarial Seal)

H. McCRILLUS,

Notary Public.

My Commission expires April 9, 1944. [51]

CERTIFICATE

I, A. B. Hvale Assistant Secretary of the Continental Casualty Company, do hereby certify that the attached Power of Attorney dated July 17, 1941 in behalf of A. B. Chase is a true and correct copy and that same is still in force.

In testimony whereof I have hereunto subscribed my name and affixed the corporate seal of the said Company this 31st day of January, 1942.

(Seal)

A. B. HVALE,

Assistant Secretary.

[Endorsed]: Filed January 31, 1942. [52]

[Title of District Court and Cause.]

STATEMENT OF POINTS.

Comes now the defendant-appellant, Union Pacific Railroad Company, and makes the following statement of the points upon which it intends to rely in the appeal taken to the United States Circuit Court of Appeals of the Ninth Circuit in the above entitled cause:

I.

That the evidence is insufficient to support a finding that the defendant was guilty of any negligence as charged in the complaint, for which reason the court erred in making and entering its findings of fact and conclusions of law and judgment in favor of the plaintiffs.

II.

That the evidence is insufficient to support a finding that the plaintiff Phyllis Stanger was injured and that she suffered damages in the amount of \$19,000.00, or in any such amount, or at all.

III.

That the damages awarded to the plaintiffs for the alleged injuries sustained by the plaintiff Phyllis Stanger are excessive and appear to have been given under the influence of passion and prejudice. [53]

That the reasons for the foregoing statement of points are more fully set forth in defendant's petition and motion for new trial.

IV.

That the court erred in denying defendant's objections to findings of fact, motion to strike and amend findings and motion to amend conclusions of law, as set forth in said objections, and erred in overruling defendant's motion to make and enter judgment in favor of the defendant.

V.

The court erred in denying defendant's petition and motion for new trial for the reasons set forth in said petition and motion.

Dated, this 3rd day of February, 1942.

GEO. H. SMITH,

Attorney for Defendant-
Appellant,

Residing at: Salt Lake City,
Utah.

H. B. THOMPSON,

L. H. ANDERSON,

Attorneys for Defendant-
Appellant,

Residing at Pocatello, Idaho.

Service of the foregoing Statement of Points by receipt of a copy thereof is hereby admitted this 3rd day of February, 1942.

JOHN FEREBAUER

CLYDE BOWEN,

Attorneys for Plaintiffs-
Appellees.

[Endorsed]: Filed February 4, 1942. [54]

[Title of District Court and Cause.]

TRANSCRIPT

Filed January 31, 1942

This matter was tried before the Court sitting without a Jury at Pocatello, Idaho, October 20, 1941. The Honorable Charles C. Cavanah, presiding.

Appearances.

John Ferebauer,

Idaho Falls, Idaho,

Clyde Bowen,

Pocatello, Idaho

W. H. Witty,

Pocatello, Idaho

Attorneys for the Plaintiffs.

George H. Smith,

Salt Lake City, Utah

H. B. Thompson,

Pocatello, Idaho

L. H. Anderson,

Pocatello, Idaho

Attorneys for the defendant.

G. C. VAUGHAN,

Reporter. [55]

October 20, 1941

Mr. Bowen: I want to move for the association of Mr. Witty as attorney for the plaintiff.

The Court: It is so ordered.

Mr. Thompson: and I have a stipulation and order for the consolidation of the two cases for the purpose of trial.

The Court: Very well.

(Whereupon the two cases were consolidated and tried under the foregoing title, as case 1149)

Mr. Bowen: The plaintiff desires that witnesses be put under the rule and excluded from the Court room.

The Court: Very well, the witnesses will remain out of the Court room.

Mr. Thompson: Does that imply that Mrs. Stanger may remain in the room while Mr. Stanger is putting on his case.

Mr. Witty: I think now that this is only one case, we have consolidated them and are now proceeding as one case.

Mr. Thompson: The cases are not merged. If there was a jury there would be two verdicts.

The Court: That is correct, I think counsel for the defendant is correct on that where you have two cases. [58]

Mr. Bowen: We consent to put Mr. Stanger's case on first, and that she leave the room.

The Court: You understand that the rule does not exclude the general manager or the representative who investigated the case for your company, or the one who has control of the case. I have always interpreted that rule in that manner, you are en-

titled to have your representative who has had charge of the case in the field.

(Opening statement by Mr. Bowen)

ALBERT G. STANGER

Being called at a witness on behalf of the plaintiffs, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Bowen.

Q. State your name to the Court and Counsel:

A. Albert G. Stanger, and my residence is Idaho Falls.

Q. How old are you? A. Forty-one.

Q. What is your business or occupation?

A. Manager of the Idaho Falls Warehouse Company. We handle and ship produce, ship and sell coal, fertilizer, insulating material, heating equipment and other articles pertaining to the general warehouse business.

Q. Is your place of business at Idaho Falls? [59]

A. At Idaho Falls, yes sir.

Q. Prior to January 13, 1940, and on that day what did your duties consist of?

A. Managing and directing the affairs of the Company. In that connection I buy and sell produce which we ship over the Union Pacific Railroad, buy coal from the Utah mines which we ship over the Union Pacific, buy fertilizer which we ship in over the Union Pacific for distribution from Ashton to Pocatello. We ship that in from Anaconda.

(Testimony of Albert G. Stanger.)

Q. Mr. Thompson: We object to all this as being entirely irrelevant.

Mr. Bowen: It will later have something to do with his earning capacity, and the loss of that earning capacity.

The Court: Objection sustained, you may proceed.

Q. Directing your attention to January 13, 1940, what if anything did you do on that day?

A. January 13, I purchased tickets for myself and Mrs. Stanger to Houston, Texas, for the purpose of attending a convention of producers and shippers, whereby I contact those I ship to throughout the season.

Q. You purchased tickets at Idaho Falls, Idaho, and your destination was where?

A. Houston, Texas. [60]

Q. Did you pay full fare for those tickets?

A. We paid full fare.

Q. Mr. Thompson: That is admitted.

Q. Do you recall what time you left Idaho Falls? A. I think we left Idaho Falls——

Mr. Thompson: I object to all this testimony down to the point of derailment.

The Court: Does your answer admit all this?

Mr. Thompson: I think it does.

The Court: You may proceed, I assume this is preliminary.

Mr. Bowen: Yes, it is.

(Testimony of Albert G. Stanger.)

Q. Just describe briefly the route the train took.

A. We left Idaho Falls in the afternoon. We came to Pocatello and changed trains, taking the train for Denver. We understood that we would arrive there the next morning, I think around eight o'clock. However, whether it was because of the weather or something else, the train was some two hours late that morning from the information we were given——

Mr. Thompson: Now this develops to be hearsay.

Q. When you say the information you were given,—strike that—directing your attention to the morning of January the 14, 1940, do you know whether immediately before the wreck the train was on time,—do you know whether the train was on schedule immediately before the wreck occurred?

[61]

Mr. Thompson: Objected to as irrelevant and not in issue in this case.

Q. According to the time-table?

Mr. Thompson: Now, we object to this as irrelevant and not in issue.

The Court: Overruled.

A. The train was approximately two hours late.

Mr. Thompson: Objected to unless counsel wishes to assume the burden by reason of charting this course, this is immaterial.

Mr. Bowen: It goes to the force and violence of this collision. The train was making up speed.

(Testimony of Albert G. Stanger.)

The Court: You may proceed. Just a minute Mr. Bowen, I think,—of course, if you know that the train was late and making up time,—I think I will sustain the objection at this time.

Q. Mr. Stanger, at Idaho Falls or other places were you furnished or did you obtain a Union Pacific time-table?

A. Yes, we had a time-table.

Q. Do you know what the time-table covered,—what railroad it covered?

A. It came from the Union Pacific for the train we were riding on.

Q. Did you consult or look at the time table to determine whether or not the train you were on, was on time, according to that schedule? [62]

Mr. Thompson: Objected to, it is leading and calls for an answer that would be hearsay. Any question on this which he might answer would be hearsay.

The Court: Overruled.

A. The time-table showed we were to arrive in Denver at a certain time, and they said we were two hours late. The Porter told us.

Mr. Thompson: We object to what the Porter said.

The Court: Sustained. You understand that I am not precluding you from showing that the train was late at that time. I think that is pertinent testimony.

(Testimony of Albert G. Stanger.)

Mr. Thompson: Now, upon my objection. I move that the testimony to the effect that the train was late be stricken.

The Court: It may be stricken for the present.

Q. Directing your attention to the morning of January 14 1940, before your train reached Denver did anything occur?

A. We were—as I stated heretofore—we were late due to the fact——

Mr. Thompson: Now we move to strike this again——

The Court: Yes, it may be stricken for the present.

A. —I better put it this way, the train wrecked.

Q. Do you know about how far out of Denver the train wrecked?

A. Approximately thirty miles. [63]

Q. Was that before arriving at Denver?

A. Yes sir.

Q. Do you know what time the wreck occurred?

A. About 9:30.

Q. Morning or night.

A. 9:30 in the morning, or in that neighborhood.

Q. Now, what were you doing. Where were you in the car at the time the wreck occurred?

A. We were playing cards. We had decided that we would until we got to Denver before having breakfast and it was decided to play a game of bridge to determine who would buy breakfast. Due

(Testimony of Albert G. Stanger.)

to the fact that we had this time on our hands we had settled down and were playing a hand of bridge.

Q. How were you seated in the car?

A. In the end of the car. My back was in the direction the train was traveling and opposite me was Mrs. Stanger and seated beside me was Mr. L. L. Hurst and opposite him was Dave Bush the Secretary of the Shippers Association.

Q. What were you playing cards on?

A. The porter had furnished us with a card table one that is inserted in the wall.

Q. What height was that?

A. The height of a table that fits that situation.

Q. Yes. Now this table was inserted in the wall. Describe that more fully. [64]

A. As I recall this table has protrusions that fits into slits in the wall that makes it rigid so that it can be used for that purpose.

Q. It was daylight when the accident occurred?

A. Yes sir.

Q. Had you had occasion to look out of the window shortly before the wreck occurred?

A. We commented upon it at that time due to the speed.

Q. Did you observe objects that you passed?

A. Yes sir.

Q. Do you drive an automobile Mr. Stanger?

A. Yes sir.

Q. How long have you driven an automobile?

(Testimony of Albert G. Stanger.)

A. Since about '13 or '14.

Q. Have you had occasion, during any of the time that you driven automobiles, to check the speed you are traveling at? A. Yes, I have.

Q. Now, directing your attention to the morning of January 14, 1940, did you make any observations of the objects you passed as to the speed you were traveling? A. I did.

Q. From your observation of the speed with which the car you were in passed these objects you observed, have you any recollection of the speed that the car was moving? A. Yes sir. [65]

Q. What is your best judgment of the speed that the car in which you were traveling was moving shortly or immediately before the wreck occurred.

A. Mr. Thompson: I object to this as not tending to support any averment of the complaint. I object to it also as being immaterial and irrelevant unless plaintiffs' counsel proposes to pursue establishing his case and assuming the burden which will follow his so doing.

Mr. Bowen: We submit that under paragraph five this is relevant.

Mr. Thompson: If he proposes to assume the burden we have no objection, with that understanding. What I am trying to make clear is that if he wishes to go into that evidence and assume the burden, as I say, I have no objection, but I do want to know the theory that we are proceeding upon.

(Testimony of Albert G. Stanger.)

The Court: I think under this allegation he may go into this. As to whether it comes under the allegation, this is a pretty general allegation that the defendant was negligent in having the management and control of the train, now whether the speed is competent here,—I think I will overrule the objection.

A. My best judgment from experience I have had would be that the car was moving in the neighborhood of sixty [66] or 65 miles an hour.

Q. Tell us what happened when the wreck occurred, or the derailment occurred?

A. It seemed to take place all of a sudden. The car swished and jolted from side to side,—that startled us and before we knew it the car simply dove headlong into the borrow pit.

Q. What happened to you?

A. It knocked us from side to side with the jolting we had. It tended to double me up. As it hit it dove me down kind of bent over with my head down and knees up, I had been thrown somewhat into the air.

Q. Was there any parts of the car broken?

A. I never had that experience before.

Mr. Thompson: Just answer the questions.

The Court: Yes, just answer the question.

A. Yes, parts of the car were noticeable. Screws were on the floor and sears thrown out of place. It was very dirty in there. Splinters were laying

(Testimony of Albert G. Stanger.)

around, and the glass in the window by which we were sitting was broken.

Q. Do you know whether any parts of the outside of the car were broken off?

A. As we managed to crawl out I noticed the steps and parts of the car down there curled up as if a great deal of pressure was exerted. [67]

Q. What stopped the car as it dove to the borrow pit?

A. It struck the borrow pit with the trucks of our car and the car in front of us was laying along side which tended to grab and stop our car.

Q. Was that stop abrupt or with violence?

A. Yes sir.

Mr. Thompson: You are leading.

Mr. Bowen: That's right, I will not do that.

Q. State whether the car was level or at an angle when it came to rest?

A. It rested at an angle in the borrow pit, and made it difficult to get out and in the car.

Q. At that time did you experience any pain or do you know whether Mrs. Stanger exhibited any evidence of pain?

A. We were all bruised up. Of course, the shock was something that we had never experienced before. One reason it became necessary for me to—I did try to get a ride immediately that was because Mrs. Stanger needed attention immediately.

Q. State what you did immediately after the wreck?

(Testimony of Albert G. Stanger.)

A. Collected ourselves as best we could and crawled out of the car, assisting Mrs. Stanger. She was more or less hysterical, and we gathered our luggage. We couldn't sit in the car or stand in it, it was at such an angle. We went outside the car.

[68]

Q. What was the condition of the weather?

A. It was in the morning and there was snow on the ground. It was wet snow, and with that condition,—with the weather condition being what it was——

Mr. Thompson: —He has answered the question we object to any comment.

Q. The weather was cold and the snow was wet.

Q. What did you do after you got out of the car?

A. I made inquiry as to whether or not any help was coming.

Q. Who did you make the inquiry of?

A. Railroad men.

Q. Who were they?

A. The Porter and I wouldn't be able to recall whether it was a brakeman or who the other man was that came alongside of the car.

Q. Did you find whether there was help coming or not?

Mr. Thompson: Objected to as it calls for a conclusion of the witness, and is based on hearsay. There is no proper foundation and it is not binding upon the defendant.

(Testimony of Albert G. Stanger.)

The Court: Sustained. I doubt that the porter could bind this company.

Q. What did you do after that?

A. Crossed the railroad in front of this car and I made my way out through the snow, through the borrow pit [69] across the fence to the highway where I stopped a car that was headed toward Denver.

Q. Did you go to Denver in that car?

A. All four of us, Mrs. Stanger and the other two men.

Q. I believe you stated that Mrs. Stanger had to have medical attention, do you know the reason?

A. Yes, shock and the jolting and bruising she received caused a conditoin to exist where she had to have medical attention, otherwise it would be very embarrassing, and it was under those conditions that she needed attention.

Q. What happened there?

A. The excitement and the condition there caused her to flow.

Q. What did you do and where did you go after you got to Denver?

A. To the Union Pacific Station.

Q. When did Mrs. Stanger start to flow with reference to the time the accident occurred and where were you?

A. At the wrecked car.

Q. What did you do after you got to the Union Pacific Depot in Denver?

(Testimony of Albert G. Stanger.)

A. We looked for friends that we were supposed to meet,—that were to meet us there, and we went in and it was thought best——

Mr. Thompson: Object to what he thought best.

The Court: Yes, we want the fact. [70]

A. We had a cup of coffee.

Q. You had a cup of coffee. A. Yes sir.

Q. Did you go any place?

A. Yes, we met these friends and they took us to their residence.

Q. In Denver? A. Yes sir.

Q. After you got there what did you do?

A. They called their Doctor to give us aid.

Q. Do you know who that Doctor is?

A. The Doctor,—the Railroad Doctor, the C & S Doctor, I cannot recall his name.

Q. Did he administer some aid to you and Mrs. Stanger? A. Yes sir.

Q. How long was it from the 14th of January 1940 until you returned to your home at Idaho?

A. You mean after we left Denver.

Q. How long after the 14th of June did you return home to Idaho Falls?

A. Approximately two weeks.

Q. What is the fact as to whether or not you suffered pain in any portion of your body during that period of two weeks?

Mr. Thompson: Counsel made a statement here, —how I wish in answer to this question that the witness [71] would answer yes or no. Counsel said

(Testimony of Albert G. Stanger.)

I believe, that Mr. Stanger received an injury to his hip, the only thing in issue is on page there where he alleges the injuries and I think they are alleged to be to the spine the back and the shoulder, and within these limits I have no objection. Since the witness is so willing and shows such a disposition to enter into long discussions I object to his testifying beyond that.

The Court: He may answer.

A. I suffered pain in the back at the time of the accident and I also had an injured hand.

Q. Describe the pain you experienced, where in your back was that pain.

A. The pain and injury to my back seemed to be a little above the middle of the back. It wasn't a severe pain but one of these aggravating pains which I could relieve by application of heat or something of that sort.

Q. During those two weeks did Mrs. Stanger complain?

A. She isn't the complaining kind but she had considerable pain and was——

Mr. Thompson: Objected to as it is not responsive but assumes that she did have pain.

The Court: If you do not object——

A. Due to the injuries it was necessary——

Mr. Thompson: Now, I object to this statement [72] as it is simply a conclusion of the witness.

The Court: Yes, that would be. He may state whether or not she complained of pain.

(Testimony of Albert G. Stanger.)

Q. State whether she complained of pain?

A. Yes, she did.

Q. Did she say what portion of her body she was experiencing pain in?

A. The abdominal region.

Q. Now, this condition of flowing do you know whether that continued from the time of the wreck?

A. Yes sir.

Q. What did you do after you got back to Idaho Falls, with reference to your injuries?

A. Mine.

Q. Yes, what did you do?

A. I immediately contacted Doctor Call, he treated me and I took exercises for several months.

Q. Who is Doctor Call?

A. He is a Doctor at Idaho Falls.

Q. Did you request him to come to this trial?

A. Yes sir.

Q. What was his reason for not being able to come?

A. Mrs. Call is not expected to live. She may pass away any minute, and for that reason he wanted to be excused.

Q. Have you gone to any—withdraw that—How many times did [73] you go to see Doctor Call for treatment?

A. I haven't a record of the number of calls, but for weeks I went twice and some weeks three times a week, and then it dwindled down to once.

(Testimony of Albert G. Stanger.)

Q. Can you tell us over what period of time you went to him? A. Up until May.

Q. Of what year? A. May of 1941.

Q. I don't think I asked you what day it was that Doctor Call told you that he couldn't come to this trial. A. Friday last.

Q. And he wanted to be excused?

A. Yes sir.

Q. Have you been to any other Doctors besides Doctor Call? A. Yes sir.

Q. Who are they?

A. I have gone to Doctor Miller for deep therapy treatments and also to Doctor Warner for attention.

Q. Did you make any trips out of town?

A. Yes, I have had treatments in Texas in July.

Q. Did you go to the Mayo Brothers?

A. Yes sir.

Q. When,—how long were you there?

A. Approximately five to seven days.

Q. Are you receiving treatments from anyone at this time? A. I am. [74]

Q. What kind of treatments?

A. Chiropractic treatments from Doctor Rogers and also deep therapy treatments from Doctor Miller at Idaho Falls.

Q. Describe the pain you have, whether it is constant?

A. It is not constant, it comes on and off. If I get plenty of rest it doesn't bother as much as

(Testimony of Albert G. Stanger.)

when I don't. If I don't give it attention it drives me from work. I have to get a treatment or go home and get a hot application in order to remove the trouble of the severe pain.

Q. Has that condition existed from the date of the accident up until now? A. It has.

Mr. Thompson: Objected to as leading and——

Mr. Bowen: I will withdraw it.

Q. State whether,—what the fact is as to whether or not the condition has existed from the date of the accident?

Mr. Thompson: Objected to on the same ground.

The Court: He may answer. Overruled.

Q. State what the fact is as to whether or not your back has caused you pain from the date of the accident up to now?

Mr. Thompson: Objected to as leading.

The Court: Overruled.

A. It has caused pain as described heretofore, but at times it isn't as severe as at other times. Sometimes it is so severe that I must quit work to get relief.

Q. Can you tell us how many times it has been necessary to [75] quit work to get some relief?

A. Some days I have had to leave the office as high as four times. At other days I have not left although it does cause me discomfort.

Q. Since when has that existed?

A. Since the accident.

(Testimony of Albert G. Stanger.)

Q. What is the fact as to whether that comes on oftener within the last six months than it did during the first six months after the accident?

A. It comes very frequently.

Q. Have you lost any time from work because of this pain? A. Yes, sir.

Q. What is the fact as to whether the pain you experienced is in the same region as you experienced immediately after the accident, that is, in the region of your back? A. It is.

Q. Directing your attention to the time before this accident what is the fact as to whether you suffered any pain in your back?

A. I did not.

Q. Were you able to perform your work without pain? A. I was.

Q. What was the condition of your health?

A. It was very good.

Q. Are you able to sleep and rest since this accident occurred,—to sleep and rest at night? [76]

A. Not like I did before the accident. I am not able to sleep regularly and get my usual sleep.

Q. Have you observed any difference in your physical condition? A. Yes.

Q. Since the accident? A. Yes.

Q. What is it?

A. I am not performing my work. I am not able to do the work I was able to do before the accident due to the fatigue and due to the fact that my back bothers me.

(Testimony of Albert G. Stanger.)

Q. You use the word fatigue just what do you mean by that?

A. When this pain hits me it weakens me to the point that I cannot carry on at work which I am required to do.

Q. Has it been necessary to employ help in your work?

Mr. Thompson: Objected to as irrelevant.

Mr. Bowen: I will reframe the question.

The Court: Very well, go ahead.

Q. Have you employed additional help since this accident?

Mr. Thompson: We object to this, this man's business, or the business he manages is not his own, it is a company.

Mr. Bowen: I will withdraw that question.

The Court: Very well.

Q. Tell the Court and counsel about your business, how it is operated.

A. The business is a corporation in the State of Idaho, the [77] stock of that company belongs to the immediate family.

Q. Do you have certain obligations that are your own individually? A. Yes, sir.

Q. Have you, individually, hired anyone to work there since this wreck? A. I have.

Q. How much do you pay them?

Mr. Thompson: Objected to as irrelevant and

(Testimony of Albert G. Stanger.)

immaterial, unless by what he testifies to he wishes to make it clear that it is his individual business.

The Court: It is a question of how this man is situated there.

Mr. Bowen: The question was as to whether he himself has hired someone to work there since this wreck.

The Court: This is a corporation and he says that the family owns the stock.

Q. What family do you mean?

A. What is that.

Q. When you say the family owns the stock of the corporation what family do you mean?

A. My own family. My father, brothers and myself.

The Court: The Company belongs to them?

A. Yes, sir.

The Court: Of course, we know that a corporation acts in a regular manner. [78]

Q. What are your personal duties and what were they immediately after this wreck, as an individual?

A. As an individual.

Q. In this corporation?

A. To run it as best I knew how. To make money. In that connection I am general manager.

Q. Just what did you do as such?

A. I took charge of the buying and selling of potatoes. Up until the first of the year I took charge of buying and selling feeds together with the su-

(Testimony of Albert G. Stanger.)

pervision of other parts of the business, the phosphate and the *hearing* departments.

The Court: Does that have anything to do with employing men.

Mr. Bowen: I will get at this shortly. His earnings.

Q. How are you paid?

A. Monthly salary and a percentage of the profits.

Q. What determines the percentage of the profits?

A. May I ask that that question be read again?

Mr. Bowen: I will reframe it.

Q. This percentage of the profits you speak of, what determines what that is?

Mr. Thompson: We object to that as irrelevant and immaterial and it does not tend to support any issue.

Mr. Bowen: In paragraph 10 we allege that [79] he lost certain earnings, and we are attempting to show how these commissions are earned.

Mr. Thompson: He hasn't said that the business suffered any injury.

Mr. Bowen: He individually hired this man to take his place.

Mr. Thompson: Was his salary suspended?

Mr. Bowen: No, but this commission, he didn't draw that.

Mr. Thompson: That is outside of the issues of this case.

(Testimony of Albert G. Stanger.)

The Court: I understand that he is limiting it to this witness individually employing others to do the work that he was to do as manager.

Mr. Bowen: We are limiting it strictly to that.

The Court: Overruled.

A. This man that I hired to take charge of the feed department is paid a hundred dollars a month with 25 per cent of the profits of that division of the business. The feed department.

Mr. Thompson: Now in view of the answer it seems to me that the objection was well taken and I move, for the reasons stated in the objection, I move that the answer be stricken.

The Court: Counsel has stated that this witness has employed someone since this accident. Let [80] me ask counsel for the plaintiff this: You assert that this witness as general manager of the business, since the accident has employed someone to perform his duty.

Mr. Bowen: Yes, your Honor.

The Court: Limited to that, I will overrule the objection.

Mr. Thompson: In order to make myself clear. I object on the ground that it is not proper to go into the profit or loss of the Company, nor who the Company hired because of some injury to Mr. Stanger.

The Court: But he is not going into that. Just who he hired individually, because of his injury.

(Testimony of Albert G. Stanger.)

Mr. Bowen: Limited strictly to what this man lost.

The Court: Overruled, limited to that.

Q. How much have you paid to this man up to the present time; if you know?

A. I think, Your Honor——

The Court: If you can't answer the question just say so.

Mr. Thompson: I renew my objection.

The Court: I will make this statement once more. The Court is permitting this to go in limited to what he paid out to have these duties performed.

A. Up to date \$800.00.

Q. Now, what is the fact as to whether you have employed [81] any help in the home since this wreck?

A. Help has been employed but Mrs. Stanger has done the employing.

Q. Are you able to inform us as to the amount that was paid for the help that was hired?

A. Does the cost take into consideration——

Mr. Thompson: I submit that no proper foundation is laid for this.

The Court: Sustained.

Q. Has Mrs. Stanger performed her household work since this wreck?

A. Not normally.

Q. Did she perform the work about the house prior to the wreck, Mr. Stanger?

A. She did.

(Testimony of Albert G. Stanger.)

Q. Do you know why she has not performed her work since the time of the wreck?

A. Because of ill health.

Q. Do you know whether or not she spends any time, and how much time she is confined to bed?

Mr. Thompson: That is objected to as it is leading and assumes matters not in evidence.

The Court: Overruled, he may answer.

A. It has been necessary for her to take much more rest than she did before the accident.

A. You do maintain a home at Idaho Falls?

[82]

A. I do.

Q. Have you employed help in that home since the wreck? A. Yes sir.

Q. Are you still employing help in that home?

A. Not on this particular day, but we do.

Q. Did you employ any help about the home to assist Mrs. Stanger in the housework before this accident? A. No sir.

Q. Do you know the amount that you yourself have paid for yourself, for Doctors Medicine and treatment? A. For myself?

Q. For yourself.

A. That was tabulated, but right now I have forgotten the figures.

Q. You can supply that later can you?

A. I can.

Q. Have you paid out anything for Mrs. Stanger's treatment? A. Yes sir.

(Testimony of Albert G. Stanger.)

Q. Do you know how much that is?

A. The doctor bill was approximately \$300.00 and the hospital bill approximately \$200.00 and besides that the special nurse, the blood transfusion and so forth.

Q. You have paid those bills?

A. Yes sir.

Q. Have you paid your own bills?

A. I have with the exception of some treatments within the [83] last week, or the last few weeks, however, there is a small balance due the Doctor.

The Court: We will recess for ten minutes.

Oct. 20, 1941, 11:25 A.M.

Mr. Bowen: Counsel has agreed that we may call Doctor Hatch out of order so that he may return to his practice at Idaho Falls.

The Court: Very well.

DOCTOR H. RAY HATCH

Being called as a witness on behalf of the plaintiffs, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Bowen:

Q. State your name? A. H. Ray Hatch.

Q. Where do you reside?

A. Idaho Falls, Idaho.

Q. What is your business or profession?

(Testimony of Dr. H. Ray Hatch.)

A. Practising physician and surgeon.

Q. Are you a regularly, duly licensed and practicing physician and surgeon? A. Yes sir.

Q. Licensed to practice medicine and surgery under the laws of Idaho? A. Yes sir. [84]

Q. Of what school are you a graduate?

A. Ruch Medical college.

Q. Tell us of any other work or training you have had equipping you for your profession?

A. The usual series of post graduate visits and courses.

Q. For how many years have you practiced medicine and surgery?

A. Since 1910, about thirty-one years.

Q. How long have you been practicing at Idaho Falls? A. Since 1920.

Q. Approximately 21 years? A. Yes sir.

Q. How many courses of Post graduate work have you had? A. I cannot say off hand.

Q. It has been a number has it?

A. Yes sir.

Q. Have you been acquainted with Phyllis Stanger? A. Yes.

Q. One of the plaintiffs here.

A. Yes sir.

Q. Have you treated her professionally?

A. Yes sir.

Q. When did you see her,—if you have seen her, after January 14, 1940?

A. I may refer to my notes, may I? [85]

(Testimony of Dr. H. Ray Hatch.)

Q. Yes, certainly.

A. My records show February 12, 1940.

Q. When she called on you, can you describe what your examination of her disclosed, if you made an examination?

A. How much detail shall I go into?

Q. Just generally Doctor, just what did she complain of?

A. She was a very nervous girl, on a rather high nervous and low emotional threshold. The emotional responses were out of proportion with the other condition, and the causes,—she complained of severe uterine bleeding. I have rather a detailed notation of this case.

Q. Well, Doctor, let me ask you, did you examine her body to see whether she had this unusual bleeding?

A. Yes sir.

Q. That condition existed?

A. Yes sir.

Q. What did you do for her?

A. Well, I prescribed emotional nervous sedatives, tonics and various recognized intravenous injections to build up the blood supply in attempting to meet such factors that caused this bleeding, in the endocrine glands, the thyroid and pituitary glands which are related and which at times in connection with the sympathetic nervous system are mixed up in these menstrual causes, this excess bleeding.

Q. Did she or did she not respond to this usual treatment? [86]

A. No sir, she didn't.

(Testimony of Dr. H. Ray Hatch.)

Q. What further did you do?

A. This bleeding continued to a rather alarming state and the blood equality or oxygen carrying properties of the blood were effected until her hemoglobin was 48 per cent. In order to meet this I operated on her after giving a blood transfusion on July 9, 1940. We removed this bleeding uterus.

Q. Would the removal of that portion of her anatomy make her sterile? A. Yes sir.

Q. Can you tell us the amount of your bill for the operation and for your entire treatment of her?

A. I cannot give you the accurate figures but it is in the neighborhood of \$350.00 or \$400.00.

Q. Would that be for your services?

A. Yes sir.

Q. Would that be a reasonable amount for the services that you performed?

A. Yes sir, under the circumstances.

Q. Do you recall how long you treated her from that time? A. From February to July.

Q. You operated in July?

A. The 9th of July.

Q. How long after that was she under your observation?

A. She appears now for a checkup occasionally, our records [87] show rather active and continual treatment until December 30, 1940, beginning February 12 and up to December 31, 1940.

Q. Did this excessive bleeding improve or get better?

(Testimony of Dr. H. Ray Hatch.)

A. Yes sir, she didn't bleed after the operation.

Mr. Bowen: That is all, you may examine.

Cross Examination

By Mr. Anderson:

Q. Doctor, was this the first time she was your patient, on February 12?

A. So far as I recall, I may have seen her at rare intervals but this is the first so far as my recollection is concerned for anything except casual matters.

Q. What does 48 per cent hemoglobin mean?

A. People of this latitude in what we call good health usually range from 85 to 105 or 110 per cent hemoglobin and 48 per cent is based upon that normal standard.

Q. What caused that,—her flowing?

A. Yes sir.

Q. You removed the ovary?

A. The uterus and the womb.

Q. Did you also remove an ovary?

A. Yes, the right ovary.

Q. What else did you do on that operation?

A. The chart shows conization of cervix, removal of the lining of the neck of the womb——

[88]

Q. But Doctor, you did remove the ovary?

A. Yes sir, the right ovary.

Q. Why did you remove the ovary?

A. Two reasons, one was there was some little cysts, and the principal reason was that in the re-

(Testimony of Dr. H. Ray Hatch.)

removal of the uterus to which the ovary is closely related, and the blood supply to the ovary was sufficiently interfered with owing to this fact, and that there were some small cysts it was considered that it would be better to remove it than to leave it with inadequate circulation.

Q. Doctor what is the function of the ovary?

A. Different functions, the pathological function being a reproduction organ that supplies the ova,—the female cell, the contribution to the new off-spring, it has the endocrine secretion,—its pathological function is reproduction and also this complex internal secretion.

Q. If an ovary is cystic that causes bleeding.

A. Not necessarily.

Q. Did it in this case?

A. I cannot say.

Q. The ovary was cystic.

A. Slightly cystic.

Q. It caused bleeding in this case, otherwise you would not remove it.

A. The removal in this case had nothing to do with the bleeding.

Q. Had nothing to do with it. [89]

A. No.

Q. Why did you remove it?

A. Partly because of the small cyst that was questionably diseased,—there is a difference of opinion,—and in the removal of the uterus the blood supply was interfered with and I questioned the

(Testimony of Dr. H. Ray Hatch.)

advisability of leaving the ovary. I think it would have been removed independent of this cyst because of what I considered the inadequate blood supply.

Q. Did you think,—strike that,—did that have any connection with the bleeding of the uterus which you operated? A. I think not.

Q. What was the condition of that uterus, was it fibrous? A. Yes, it was fibrous.

Q. What does that mean?

A. It means that there is an increase of connective tissue which constitutes the major portion of the walls of the uterus, also an increase of tensesness or hardness of fibrous tissue composing the wall of the uterus.

Q. That is usually caused by some infection at or following child-birth.

A. No sir, not usually. It is a process that comes on unavoidably with women as they approach the change of life. It is the beginning of nature's effort to do away [90] with the uterus.

Q. You operated and severed part of the uterus.

A. Removed practically all of the uterus.

Q. You did that to stop the bleeding.

A. To stop this excess bleeding.

Q. Now Doctor, you would say that it was the fibrous condition of the uterus which caused the flowing.

A. I didn't complete my answer to your last question as to the condition of the uterus.

(Testimony of Dr. H. Ray Hatch.)

Q. Can you answer my question I ask now?

A. I cannot answer it yes or no.

Q. When you operated,—before you operated on Mrs. Stanger you made a pre-operative diagnosis.

A. Yes sir.

Q. What was that?

A. Bleeding uterus, but that is not a very accurate diagnosis.

Q. You knew that you had to perform the operation, you were reasonably certain that she had a fibrous uterus?

A. I wasn't entirely certain as to the detailed condition, or the total condition that we would find in the uterus.

Q. What did you expect to find?

A. Well, the range of conditions are quite large which might cause bleeding in the uterus. As my examination disclosed the uterus was only fairly firm, like the uterus in some women it wasn't enlarged. There is also [91] quite a range of possible explanation for a uterus of that type, the indication for operation was the stoppage of this hemorrhage that failed to respond to the more conservative treatments that was more important, rather than concern about the particular abnormalities that might be found in the uterus.

Q. What was the pathological report after operation?

A. The pathological diagnosis, fibrosis uteri with diffuse endometrial hyperplasia—

(Testimony of Dr. H. Ray Hatch.)

Q. Just give us the pathological report.

A. Yes, and chronic fibrous cervicitis; multiple follicular cysts of the ovary with corpus hemorrhagicum.

Q. That was the conclusion.

A. That was the pathologist's report after a study of the tissue I removed.

Q. The uterus and the ovary and the cervix is low in the body, behind the pelvis.

A. Behind the pelvic bone, behind the pelvic and pubic bone.

Q. Doctor, describe fibrosis uteri with diffuse endometrial hyperplasia. What is that?

A. Thickening of the lining of the uterus.

Q. Was that a result of a fibrous uterus?

A. It is perhaps an independent condition.

Q. It is due to advance age of a woman?

A. It occurs more frequently in women of more advanced years but also occurs in young women.

[92]

Q. What is chronic fibrous cervicitis?

A. That is a result,—it is scarred tissue formation in the neck of the womb, that is very frequently due to chronic infection following child-birth and so forth.

Q. The same that would cause fibrous uterus?

A. Not exactly the same.

Q. You said infection and scar tissue following child-birth could cause fibrous uterus?

A. I didn't mean to say that.

(Testimony of Dr. H. Ray Hatch.)

Q. Didn't you say it could cause it?

A. I think it could if there was severe infection.

Q. Did you attend Mrs. Stanger at the birth of her last child? A. No sir.

Q. Do you know when it was born?

A. A baby about one year old on February 12, when she came to see me.

Q. You did have a history of her having this bleeding following this child-birth and prior to January 1940?

A. Following the birth of the child, yes.

Q. Did you treat her for that?

A. No sir.

Q. Was that before January 1940 she was suffering from this trouble of flowing?

A. Well, I am informed that she did have some flowing following the birth of her baby. [93]

Q. Successive or continual,—it was unusual, it wasn't the normal flow, was it Doctor?

A. I understand she was treated for it.

Q. And from then it came down to the thing for which you operated, the cause was continuous down to the time you operated.

A. No, sir, I understand there was a long period that she was free from excessive flow, either as to amount or duration for some time previous to my treating her.

Q. You don't know for what period or when?

A. No sir, I haven't any accurate date on that. I am sorry.

(Testimony of Dr. H. Ray Hatch.)

Q. You specified that she had fibrous uteri; chronic fibrous cervicitis and cystic ovary.

A. Prior to the operation?

Q. Yes.

A. No sir, I would like to qualify that statement.

Q. You operated to stop this bleeding?

A. Yes sir.

Q. It is your opinion that the operation was necessary to do that? A. Yes sir.

Q. Did you know,—did she tell you that she had been to other Doctors for similar treatment prior to coming to you?

A. She told me that she had been to other Doctors for treatment.

Q. For this same condition? [94]

A. Yes sir, that is, for bleeding that was prolonged after childbirth.

Q. That bleeding that was prolonged indicated fibrous uterus or cystic ovaries or chronic fibrous cervicitis?

A. Likely none of those. Bleeding that is prolonged after childbirth is what we call *sub-involution*.

Q. Doctor, what are the symptoms of chronic cervicitis and multiple follicular cysts of the ovary with corpus hemorrhicum?

A. They usually don't have symptoms.

Q. Mrs. Stanger had symptoms?

A. Yes, sir, she had symptoms.

Q. What were her symptoms?

(Testimony of Dr. H. Ray Hatch.)

A. Bleeding uterus, nervous, emotionally upset. The thing that concerned me was the bleeding uterus.

The Court: It appears that you will not finish this witness in a short time, so we will recess until 2 o'clock.

2 o'clock P. M. October 20, 1941.

Cross Examination
continued

By Mr. Anderson:

Q. Did you say that you had talked with other Doctors who might have treated Mrs. Stanger to get a history? A. No sir.

Q. Did she tell you the Doctors she had gone to before you treated her? [95]

A. I think that was brought out in my questioning of her.

Q. And who had she gone to?

A. I have a record of Doctor Wooley of Idaho Falls.

Q. He had treated her just prior to her leaving on this trip.

A. I don't have the data as to how long prior.

Q. It was prior to this trip? A. Yes sir.

Q. He had been treating her for the same thing you had treated her for afterward.

A. I cannot testify to that. It was subsequent to the birth of her child. My information is quite limited as to what it was for, except it was between

(Testimony of Dr. H. Ray Hatch.)

the time of the birth of her child and the time she came to me.

Q. You understood that it was for the same thing.

A. You say, I understood.

Q. You understood that it was for the same thing.

A. Well, she said it was for her prolonged flow and it had been helped by shots.

Q. She had been treated for this condition before she went on her trip and before you saw her.

A. I cannot say that by answering yes or no.

Q. You treated her for excessive flowing.

A. And continued flowing.

Q. And so did Doctor Wooley.

A. I don't know as to the detail of that. [96]

Q. Any other Doctors that you recall?

A. I don't recall.

Q. Did she mention Doctor Miller?

A. I know he was the family physician but I don't know that his name came up at that time.

Q. Doctor Miller took care of her at the birth of her last child? A. I understood so.

Q. On the pathological statement, the last part says, after chronic fibrous cervicitis,—multiple follicular cysts of the ovary with corpus hemorrhagicum. What is a follicular cyst?

A. When the ovum breaks through the wall it leaves a temporary wound on the surface of the ovary and at times that seals over before the follicle,—it prematurely seals, as a result there is a slight

(Testimony of Dr. H. Ray Hatch.)

distension of that cavity that had become prematurely sealed over.

Q. Doctor, my question was what do you mean by follicular.

A. The female sex cell is called a follicle. As the ovum develops that follicle enlarges so that when the ovum breaks through or ruptures through the wall,—the cavity or structure which contains the ovum is called the follicle.

Q. The sealing of the cavity you spoke of caused these follicular cysts. Multiple means many.

A. More than one. [97]

Q. These multiple follicular cysts, was it an unusual condition?

A. Not unusual where they occur.

Q. But it is an unusual condition. Isn't it something contrary to nature?

A. I can give my opinion that there is not much of the abnormal in nature.

Q. Can you answer the question?

A. I cannot answer that yes or no.

Q. Why?

A. Because there is a divergence of opinion, and that is not an accurate statement.

Q. Some say it is an abnormal situation.

A. And others say that it is and that it is not of much significance.

Q. Would you say that some authorities say it is something that is against nature, or something that goes with nature?

(Testimony of Dr. H. Ray Hatch.)

A. That is a hard question to answer, whether it is against nature or going against nature.

Q. Let me ask this, is it consistent with the natural process of women?

A. You mean these cysts?

Q. Multiple follicular cysts.

A. May I elaborate on that answer?

Q. Tell me this,—answer my question. [98]

The Court: You may answer the question and explain your answer.

Q. Doctor, it is the exception rather than the rule to find a condition such as this existing?

A. The exception to what rule.

Q. In an ovary that is normal in a well person.

A. I can say that it is not exceptional,—that is, is not an exceptional experience, because we find it frequently in operations upon women for other conditions.

Q. For which reason you deem it advisable to remove the ovary?

A. No sir.

Q. But you did in this case?

A. Only partially the reason.

Q. Did you ever find this same condition existing in a well woman?

A. I haven't operated knowingly on any well women.

Q. Then you don't know that it exists in well women?

A. In a woman who might be well so far as the ovaries are concerned.

Q. What does this mean in the pathological re-

(Testimony of Dr. H. Ray Hatch.)

port after it says "multiple follicular cysts of the ovary" then it says "with corpus hemorrhagicum"?

A. That is one of these follicles that has just recently discharged its ovum, and the cavity is filled with a clot of blood. [99]

Q. That is not the result of normal flowing?

A. Normal ovulation.

Q. Didn't that create a bleeding condition?

A. Of the uterus.

Q. Of the ovary.

A. That is insignificant, the bleeding that happens when the ovum is discharged.

Q. If it is multiple is it still insignificant?

A. It isn't often that we find that condition.

Q. Didn't you diagnose this as multiple cysts with corpus hemorrhagicum?

A. No, not hemorrhagicum. Not hemorrhagicum cysts.

Q. Did you take any other history, other than you told me? Did you search the hospital record, or did she tell you anything that might have had a bearing on your treatment, prior to leaving on this trip?

A. Yes sir.

Q. What was that?

A. These matters of history,—we take a careful history.

Q. What was that history?

A. A tonsil operation, appendix operation, three children, baby one year old, and matters of general interest.

(Testimony of Dr. H. Ray Hatch.)

Q. Did she mention toxemia pregnancy in 1938 or 1939? A. I haven't it recorded.

Q. And threatened abortion?

A. I haven't that recorded. [100]

Q. Did she tell you about those?

A. No sir, I don't recall that she did.

Q. You didn't check the record of the hospital.

A. No sir, and I think the appendix was elsewhere.

Q. This operation was at the L D S hospital at Idaho Falls, didn't you think that it was important to check the record to see what other operations she might have had? A. No sir, I didn't.

Q. What is toxemia pregnancy caused from, can you tell us Doctor? A. No sir.

Q. Well, what is it?

A. It is a very broad term which includes any untoward complication of the body,—chemistry associated with the state of pregnancy.

Q. And caused from excessive flowing from the ovaries?

A. I never heard of that as one of its causes.

Q. What causes threatened abortion?

A. The causes are legion.

Q. Excessive flowing is one of the symptoms?

A. That is a part rather than a symptom.

Q. Just before you operated in July 1940 you had a preoperative diagnosis of fibrous or fibrosis uteri and chronic cervicitis is that correct?

(Testimony of Dr. H. Ray Hatch.)

A. The record will show that was my tentative opinion.

Q. Isn't it a fact that your history taken just before [101] you operated, was that to the effect that she commenced to menstruate at fourteen and was regular until delivery of her child in 1939 and since that time she had been flowing instead of four days, always three weeks? Do you recall that is correct?

A. I don't recall taking such a history.

Q. I will show you what is purported to be a case history. I show you now what is marked as plaintiff's exhibit,—defendant's exhibit "1" that is the hospital record of Mrs. A. G. Stanger, and the record of the operation which you performed in July 1940?

A. It is, yes.

Q. Is it also the pathological report,—does it also contain the pathological report in addition to your pre-operative diagnosis and the history you took?

A. I must apologize because I cannot read the wording of this diagnosis.

Q. You wrote it did you not? A. No sir.

Q. You wrote the history?

A. I didn't write this history.

Q. That is the history you gave to someone, or was given to you?

A. It was a history written perhaps subsequent to the operation by our house Doctor from the

(Testimony of Dr. H. Ray Hatch.)

writing I would say Doctor Fred Price, now this final diagnosis [102] is my handwriting.

Q. And what is that?

A. Fibrosis uteri, hyperplasia endometrium, multiple cysts right ovary, corpus hemorrhagicum and fibrous cervicitis. That is my handwriting.

Q. That is the hospital record of her case.

A. On the second line and the last portion of the provisional diagnosis that is also my handwriting, secondary anemia.

Q. That was the pre-operative diagnosis.

A. Yes, but it was probably done subsequent to the operation, from my office records.

Mr. Anderson: We offer in evidence exhibit "1".

Mr. Bowen: We have no objection to the portion that Doctor Hatch thinks that he wrote, but we object to the other as being incompetent, irrelevant and hearsay and not properly identified and no proper foundation laid.

Mr. Anderson: This is a report made in the course of business at the hospital in each case, and in this particular case.

Q. Is that right Doctor? A. Yes sir.

Mr. Anderson: We offer it in evidence, we think now that the Doctor has identified it. [103]

Mr. Bowen: We renew our objection, the Doctor says it is not in his writing.

The Court: Would it come under the rule the same as a nurse's report who is in attendance on a patient, there would be more than one nurse and

(Testimony of Dr. H. Ray Hatch.)

they would be in attendance in the absence of a Doctor and those reports are admissible. We don't have to prove that the Doctor made all the entries. If it is a record kept by those in attendance, or by another physician who may have assisted. I understand that it is admissible, and it may be admitted.

Mr. Bowen: I agree to this extent that if he cannot read it as he says, it should not be admitted as having been identified by him.

The Court: If it is a record of the hospital and properly kept, it is admissible. Objection overruled.

Q. Doctor did you say that you removed the ovary to control the circulation of blood, is that what you said?

A. I thought at the time of the operation that in the process of removing this bleeding uterus, that the remaining blood supply to this right ovary was sufficiently interfered with to jeopardize the condition of the ovary subsequent to that.

Q. Does the uterus supply the circulation of the blood to the ovaries? [104]

A. There is a double supply to the ovaries, one from the pelvis and the other comes up the side of the uterus outward to reinforce the blood supply to the ovary.

Q. To both of them? A. To each ovary.

Q. You removed one?

A. Yes sir the right one.

Q. The other was left in *tack*?

A. Yes sir.

(Testimony of Dr. H. Ray Hatch.)

Q. That pre-operative diagnosis was cystic ovary? A. No sir, not entirely.

Mr. Anderson: I believe that's all.

Redirect Examination

By Mr. Bowen:

Q. I think you said that when Mrs. Stanger came to you in February 1940, you found some evidence of nervous emotional shock. I will ask you whether in your opinion the nervous and emotional shock produced by the accident was a contributing factor to the uterine bleeding, the bleeding for which you operated?

Mr. Anderson: Objected to as leading.

The Court: It is suggestive of an answer, sustained.

A. I will ask you Doctor, what is the fact as to whether or not in your opinion the nervous emotional shock [105] produced by the accident was a contributing factor to the uterine bleeding?

Mr. Anderson: Objected to further it is not proper redirect examination and also that there is no proper foundation laid.

Mr. Thompson: Also it is assuming a fact not established by the record.

The Court: Cannot the attending physician who examines a patient and has a history, give an opinion as to what the result might be. Of course, you have not gone far enough in informing the Doctor of the conditions. I will sustain the objection.

(Testimony of Dr. H. Ray Hatch.)

Mr. Bowen: Withdraw the question.

Q. Doctor, when Mrs. Stanger came to you in February 1940 did she tell you about the accident or the train wreck? A. Yes sir.

Q. Did she tell you something about it? What happened to her in the wreck?

A. Repeat that question please.

Q. Did she tell you about what happened to her when the wreck occurred?

A. No sir, I haven't a record of what happened to her with the exception of the accident.

Q. Do you have any independent recollection of what she [106] told you about this wreck she had been in?

The Court: Why don't you ask him a direct question?

Mr. Bowen: Very well.

Q. Doctor, do you have any independent recollection of Mrs. Stanger telling you in February 1940 of being in a train wreck?

A. I have a record of that.

Q. Independent of your record do you recall her telling you that?

A. That is in keeping with my record which I have refreshed my recollection and memory with, I have a notation of it here.

Q. Doctor, do your records show what she told you about this train wreck?

Mr. Thompson: I submit that he has testified that it doesn't.

(Testimony of Dr. H. Ray Hatch.)

Q. The Court: Does your record show what she told you about this accident.

A. The fact of an accident, she told me that and the effect of it.

The Court: Did she tell you when and where it occurred?

A. A train accident on the Union Pacific. I don't have the record, but I understood that it was somewhere near Denver, on January 14, 1941. [107]

Q. Would that be 41 or 40?

A. That would be 1940.

Q. And as to what happened in that accident?

A. The details you mean?

Q. Yes.

A. If she did, I don't have the story.

Q. You don't have any independent recollection of it at this time? A. No sir.

Q. Other than the physical examination of the uterus prior to the operation state what the fact is as to whether the condition you found of the pelvic organs, including the uterus, warranted the operation that was performed, aside from the bleeding?

A. That is the pre-operative examination?

Q. Yes.

A. I would say no, independent of the bleeding, no.

Q. Doctor, did you make any examination of the portions removed, after the operation was performed? A. Yes sir.

Q. What did that examination disclose?

(Testimony of Dr. H. Ray Hatch.)

A. A moderate fibrosis of the uterus, not particularly enlarged. Follicular cysts of the ovary with this blood clot in the recently ruptured ovarian follicle. A considerable thickening of the lining of the uterus.

Mr. Bowen: That is all. [108]

Recross Examination

By Mr. Anderson:

Q. Doctor, did you say that as to this bleeding it was not necessary to operate for that, is that what you said?

A. No sir. I intended to say was that the physical findings before the operation did not disclose enough definite abnormality to justify the operation if it had not been for this, what we thought, otherwise intractable bleeding.

Q. These other, or these abnormalities which you found were sufficient to cause the bleeding?

A. There is a question in my mind about it.

Q. Might and might not.

A. That's right.

Q. You perform several of these operations a month? A. No sir, I do not.

Q. You have performed quite a number in the past? A. Yes sir.

Q. And a great many that there was never a train wreck involved? A. That's right.

Mr. Anderson: That is all.

Mr. Bowen: That's all.

(Testimony of Dr. H. Ray Hatch.)

Mr. Bowen: May the Doctor be excused now?

Mr. Anderson: We have no objection.

A. G. STANGER [109]

being recalled, testified as follows:

Direct Examination

(continued)

Q. Mr. Stanger, have you noticed any physical difference in your ability to walk since the accident in January 1940, compared with before that?

A. Yes sir.

Q. What difference have you observed.

A. My right leg occasionally becomes numb. I don't know just how to explain it.

Mr. Thompson: I move to strike that, as not within the pleadings, not within the issues in this case.

Mr. Bowen: We raise that, we allege injuries to the back and spine.

The Court: Denied, go ahead.

Mr. Bowen: That is all, you may examine.

Cross Examination

By Mr. Anderson:

Q. Mr. Stanger, what time did you leave Denver that night?

A. About eight o'clock as I recall.

(Testimony of A. G. Stanger.)

Q. Traveling over the Colorado Southern to Houston, Texas?

A. Traveling on the C & S to Fort Worth and Dallas.

Q. How long did it take you to travel to Houston?

A. We were in Dallas the following morning and then in Houston the following morning after that. [110]

Q. About thirty-six hours?

A. I would have to add that up.

Q. How long were you in Houston?

A. I think the convention was three days.

Q. You were there during the convention?

A. Yes sir.

Q. Mrs. Stanger was there with you?

A. Yes sir.

Q. You went down to Mexico after the convention? A. Yes sir to Mexico City.

Q. How long were you there?

A. I cannot recall but we were gone from home about two weeks if I remember right we were there three or four days.

Q. You were in Mexico City about that time?

A. About three days.

Q. From Houston to Mexico City, did you go on the train? A. Yes sir.

Q. What did you do in Mexico City?

A. Visited some of the historic sites as best we could.

(Testimony of A. G. Stanger.)

Q. Traveled about in a sight-seeing car or automobile? A. In a taxi.

Q. Leaving there you came back to where?

A. To Los Angeles, that is, we arrived there in the morning and left the same night for Idaho Falls.

Q. Did you travel on the train from Mexico City to Idaho Falls? [111] A. Yes sir.

Q. You returned about January 31st?

A. Somewhere around there, either the 29th or 30th, around there.

Q. Then Mrs. Stanger went to Doctor Hatch on the 12th or 14th of February?

A. I don't know that.

Q. You heard Doctor Hatch testify that she just came there on February 12th.

A. I didn't pay any attention to the dates. I heard his testimony.

Q. This card table in that car, the top of it is just a little below the window sill of the car?

A. Yes sir.

Q. These seats of the car are cushioned both bottom and back? A. I think generally.

Q. They make a bed out of these seats at night. The seats that you sit on are put together to make a bed?

A. They do some shuffling around but I am not acquainted with the movements.

Q. The seat was cushioned that you sat on?

A. Yes sir.

Q. You sank down in the cushion to some extent?

(Testimony of A. G. Stanger.)

A. Yes, I would say that the cushion would give.

Q. You would say that you sank in the cushion?

[112]

A. It is a relative matter.

Q. Well, they are soft seats. They are cushioned.

A. They are cushioned, but some are hard.

Q. The backs were cushioned too?

A. This same material.

Q. That was a standard sleeper.

A. There is a difference, a pullman and a standard.

Q. You travel quite a bit do you not, Mr. Stanger?

A. I am not acquainted with your terms.

Q. You didn't go in a tourist car.

A. I would not be surprised.

The Court: Now you are beginning to leave a doubt in this Court's mind as to how this man traveled. May I ask him a question of two here. Did you buy a ticket on the regular standard car of a tourist car.

A. I think a regular standard car.

The Court: Pullman car.

A. Yes sir, a pullman car.

Q. From Huston Texas,—withdraw that—From what you said I assume that for a remedy, or to get relief for your back that you seek rest?

A. That's right.

Q. What kind of rest? Do you lie down?

A. When I get deep therapy treatments I lie

(Testimony of A. G. Stanger.)

on my back,—I lie on my stomach and they put coils on my back, and [113] when I go home there are two methods, I either get in a tub of hot water or get an electric pad.

Q. When you leave the office two or three times a day you go home? A. Yes sir.

Q. And lie down? A. Yes sir.

Q. Did that give you relief?

A. When I use the pad.

Q. Moving about exaggerates your pain.

A. Sometime and sometimes it does not, it doesn't when it isn't so bad, but when it is bad I have to get relief.

Q. Exertion makes you tired and causes pain?

A. What do you mean by exertion?

Q. Well, you move about in your business.

A. Ordinarily it is at a desk but quite confining.

Q. You said that if bothered you to talk.

A. Occasionally.

Q. Do you get relief from that by resting and lying down? A. Yes sir.

Q. Do you notice any pain in twisting around, working around the garden and the lawn?

A. I haven't done any garden or lawn work for over two years.

Q. This pain is up about in the middle of your back, just below the shoulder blades.

A. About in there (indicating) just below the shoulder [114] blades. Just above the midsection of the back.

(Testimony of A. G. Stanger.)

Q. You used to play football?

A. Yes sir, I did.

Q. You had an injury to your shoulder and back in playing football.

A. I had an injury to my shoulder. A slight injury.

Q. In the vicinity of where *you* back is bothering you now.

A. No sir, it was on the point of the shoulder.

Q. You said that if you got plenty of rest that the pain didn't bother you?

A. If I get plenty of rest it doesn't bother like it does when I don't get the rest.

Q. And occasionally it drives you from your work.

A. That is correct.

Q. You play golf do you Mr. Stanger?

A. Occasionally.

Q. Do you know how many times you played in 1939 before you went on this trip?

A. No sir I haven't any recollection.

Q. Do you know how many times you played subsequent to that trip, in 1940?

A. Yes, a number of times in 1940 and a number of times this year.

Q. Some days you played thirty-six holes; and sometimes 18 holes in a day.

A. I don't think I ever played 36 holes, I have played 18 [115] occasionally.

Q. If I understand golf, you walk around and carry your club and swing at a ball.

(Testimony of A. G. Stanger.)

A. That is the usual procedure.

Q. And hope to hit it.

A. That's right.

Q. You are a pretty good golfer, what is your score for nine holes.

A. You are embarrassing me, sometimes you might be hot and other times you are terrible. I have on one or two occasions in my golfing experience made a fair score, I think the best was 39 and of course, there is no use telling how high I have been.

Q. That is about three over par for the Idaho Falls course.

A. I think par for that course was 35 and they then changed it to 36, I may be wrong about that.

Q. Your golf score was better in 1940 than it was in 1939.

A. I would say no better. However I will say that I started to play golf with some enthusiasm in 1939, prior to that I had played tennis.

Q. How many years have you played.

A. Very little before 1939.

Q. How many yards is that course at Idaho Falls?

A. I don't know. The score card tells but I don't know.

Q. Is it nine or eighteen holes?

Q. Eighteen now, but it was just finished last year.

(Testimony of A. G. Stanger.)

Q. *Usually* what is the distance between holes, some [116] fairways are four hundred yards.

A. The longest hole is about 420 yards. I may be wrong on this but I think that is correct.

Q. On some holes you have to walk up and down.

A. I wouldn't say any holes in particular, I would say that the course is rolling, especially the first nine holes and a few *swails*. The second nine is practically flat.

Q. You don't know how many times you played, but you would say it was several times a month.

A. I cannot answer the question. I don't keep track of how many times I play. I do play very little at times. I know that I played very little during the month of July,—in fact I played no golf whatever during that time.

Q. Isn't it a fact that your handicap dropped from 18 in 1939 to 14 in 1940.

A. I cannot answer that.

Q. You played in tournaments.

A. I played in one.

Q. You played in a tournament in Sun Valley.

A. I did.

Q. That was the Shippers and growers.

A. That is correct.

Q. And you won your match.

A. I think I was fortunate in that [117]

Q. Didn't you win the preliminary and the elimination. A. I won a cup, temporarily.

(Testimony of A. G. Stanger.)

Q. The Gold course at Sun Valley is a more sporty course than the Idaho Falls course.

A. That is correct.

Q. After you play the first hole you go down to Trail Creek.

A. That's right.

Q. On Number 7 you climb up to the bench again?

A. I don't remember the hole but you cross the creek and you play around the bench to one of the holes.

Q. It is more difficult to traverse than the Idaho Falls course.

A. I would say more strenuous.

Q. How many holes did you play in Sun Valley through the preliminary and the finals.

A. I think the first day it was 18 and the next day it was 18 more.

Q. When was the finals?

A. The finals were on the second day.

Q. Do you know what the distance is around that course?

A. No sir I don't.

Q. Quite similar to the nine holes at Idaho Falls.

A. Well, it is some different, but so far as distance I don't know.

Q. How does it compare in yards or feet.

A. This is just a guess. I would say longer but I *may* [118] *wrong* on that.

Q. I think you are right. You have had your tonsils removed.

A. Yes sir.

(Testimony of A. G. Stanger.)

Q. When was that done.

A. That was done the first or the middle of July this year.

Q. This year. A. Yes sir.

Q. You have had a number of teeth removed?

A. Yes sir.

Q. That was a number of years ago.

A. Yes sir.

Q. About when?

A. Five years and seven years ago.

Q. They were abscessed and you were having trouble with them.

A. They were not abscessed. I had a partial plate earlier in life and the plate would not stay tight. It was causing *my* considerable trouble so I decided to have them all out in order to get more convenience.

Q. Who examined you prior to that time.

A. To taking out the teeth.

Q. At the time you had them taken out, before you had them out.

A. I think Doctor Neilson.

Q. Where was he? A. Idaho Falls.

Q. He recommended that you have your teeth out?

A. Not necessarily but this bridge came loose and I had [119] them out.

Q. Before you had the bridge put in you had some teeth removed, did you?

A. No, I had an accident and had one broken

(Testimony of A. G. Stanger.)

off and one chipped which resulted in the bridge in front.

Q. This trip to Mayo's, you went there with your Father. A. That is correct.

Q. That was the only reason you went was because your Father was going and you met him and accompanied him to Mayos.

A. That is correct.

Q. You are quite a large shipper of freight over the Railroad.

A. We pay them thousands of dollars a year.

Q. Produce is what you ship.

A. Produce, coal, fertilizer, feed, and livestock.

Q. It is a fact that you have since this trip, endeavored to force the railroad to make payment on the theory that you are a good shipper of freight.

A. No sir.

Q. That is not true.

A. No sir, that isn't true.

Q. You didn't write to Mr. Jeffers on January 2, of this year. He is the president of the Union Pacific.

A. I did write to Mr. Jeffers, I don't remember the date.

Q. I show you what has been marked as defendant's exhibit [120] "2" that is a letter which you wrote to Mr. Jeffers? A. That's right.

Mr. Anderson: We offer exhibit "2" in evidence.

Mr. Bowen: Plaintiff objects to the introduction of this letter for the reason that it does not show

(Testimony of A. G. Stanger.)

any compromise and for that reason it is incompetent.

The Court: I have not seen the exhibit yet, you may go on with something else and I will look this letter over and rule later.

Mr. Anderson: I think that is all the cross-examination I have.

Redirect Examination

By Mr. Bowen:

Q. Now Mr. Stanger can you tell us now much golf you played in 1940?

A. I cannot. I don't know.

Q. Would you say that it was more or less than the preceding year, if you know.

A. I would say that I played less this year than last year, and less in 1940 than in 1939.

Q. What is the fact as to your ability to play this game through without resting?

A. I haven't been able to go through 18 holes without trouble, of course that all depends on the rest I have, [121] generally it is necessary to rest, that is due to this pain. At Sun Valley I took milk to the golf course with me. I can tend to eliminate some of the suffering by a glass of milk.

Q. What is the fact as to whether you suffer during the time you play?

A. Yes I suffer during the time I play.

Q. What is the fact as to whether you had to lie down on the golf course.

(Testimony of A. G. Stanger.)

A. Yes, I had to get some relief and to lie down was the way I could get it.

Q. What is the fact as to whether you had to give up games that is, stop certain games?

Mr. Thompson: Objected to as leading.

Mr. Witty: We have a right to lead this witness, this is redirect examination.

The Court: No you cannot lead on direct, redirect, or rebuttal. That is fundamental. Sustained.

Q. State whether you would play these games through after you started. A. Not always.

Q. Why?

A. Because of the pain I experienced.

Q. Where was the pain?

A. In the back generally. Sometimes in the leg, but generally in the back. [122]

Q. You stated about this trip down to Mexico City, state what you experienced in the way of physical experience on that trip?

A. It was necessary to have some attention due to the physical condition we found ourselves in, and it was necessary to get extra berths and cut the trip short on account of the physical condition we were not able to make some of the trips we originally planned.

Q. How did you travel from Denver to Houston?

A. By train.

Q. By Pullman or otherwise?

A. Pullman.

Q. Were you able to sleep at night?

(Testimony of A. G. Stanger.)

A. No sir.

Q. What did you do.

A. Well, we did the best we could under the circumstances. This accident which occurred so upset us that it was impossible to sleep. We rested the best we could. The Railroad furnished some extra pillows in the daytime to get as much relief as we could.

Q. What about your ability to sleep, does it affect you now?

Mr. Anderson: Objected to as leading.

The Court: Sustained.

Q. Have your nerves been affected any additionally since this wreck, any more than they were before?

Mr. Thompson: Objected as not redirect examination in any sense and would be only his conclusion.

The Court: It is not proper redirect, it seems that it is a part of their main case, but I will let him answer.

A. I would say so,—I become more easily fatigued and I do not sleep as restful as I did before the accident.

Mr. Bowen: That's all.

Recross Examination

By Mr. Anderson:

Q. But you are spending more time at the office than you did when you came back from Mexico.

(Testimony of A. G. Stanger.)

A. No. If it meets with your approval I can explain——

The Court: You have answered the question let's get along.

Q. I don't know whether the Court understands this game of golf——

The Court: If you are going to make an explanation for my benefit it is not necessary. I played the game only a couple of times but I understand how it is played.

Q. Then I will withdraw that question. How far do you generally drive the ball off the tee, that is, when you get a good drive.

A. I would have to say that generally I don't get a very good drive. [124]

Q. You swing just as hard whether you get a good or bad drive? A. Yes sir.

Q. You got good drives in Sun Valley?

A. Some good and some terrible.

Q. You beat Eddie Harper who was formerly state champion.

A. I don't know whether I played with Eddie or not.

Q. Don't you know who you played with in either the preliminary or the finals?

A. I really don't.

Q. You have played with Eddie Harper?

A. I have played with him, but I don't know whether he was in the foursome I was in or not.

Q. Mr. Anderson: That is all.

(Testimony of A. G. Stanger.)

Redirect Examination

By Mr. Bowen.

Q. Now Mr. Stanger you did go back to Mayo's?

Mr. Thompson: We object to this as leading and not proper redirect.

The Court: This thing is abusing the rules of evidence, you have each had about three chances at this witness. I will sustain this objection.

Mr. Bowen: That is all.

Mr. Anderson: That is all.

The Court: Now as to this exhibit, I think it was number "2" the letter. [125]

(Further argument by counsel.)

The Court: The objection is overruled. Admitted.

DEFENDANT'S EXHIBIT No. 2

IDAHO FALLS WAREHOUSE CO.

Bonded

A. E. Stanger

A. G. Stanger

Idaho Falls, Idaho

January 2, 1941

Mr. William M. Jeffers

c/o Union Pacific System

Omaha, Nebraska

Dear Mr. Jeffers:

It has been our experience that it is a good policy to bring about a friendly and mutual understand-

ing regarding the mistakes that have been made (intentional or otherwise), and that promptness regarding such incidents generally means for business relationships that prove profitable.

The writer would like very much to be able to start the New Year with a friendly feeling toward the Union Pacific System but incidentally it seems that such isn't going to be the case. Nearly a year has elapsed since the writer together with Mrs. Stanger had the misfortune of being in the wreck that took place just out of Denver. Since that time, little or no effort has been made by your personnel in charge of such cases to bring about a satisfactory settlement, and, as a result, it now becomes necessary to take this case to the Courts for their consideration.

Regardless of the outcome (win or lose) when Court Action becomes necessary, it doesn't make for the same mutual satisfaction and understanding as where such cases are closed by mutual consent.

The other day we had one of our good customers call us regarding an accident that took place in his new home. We had recently made installation of a splendid heating unit (furnace and stoker) and in some way or other just after the paper and painting had been completed something took place that resulted in a minor explosion. The new home was filled with smoke and soot. You can imagine the anger and disgust that the new owner and our customer felt.

It wasn't our fault—the job had been completed to their satisfaction—but nevertheless we felt we had an interest in their problem. Our interest was to the extent of making them satisfied, and although absolutely free from blame, we did what was reasonably requested by our customer. It was rather costly, but even now we find that our prompt interest in their problem [310] has made for friendliness, but very easily could have been the opposite. It has resulted in a relationship that continues to be pleasant and profitable due to our promptness and interest in their misfortune.

Being shippers of not only produce, but livestock, feeds, coal, fertilizer, bags, and so forth, and knowing that your welfare in this section is somewhat dependentt upon the good will you have with the shippers, it would seem that it is your problem of bringing to a happy conclusion with us as victims of this unfortunate accident in somewhat the same manner as we satisfied our good customer.

It is true that we have been called on a couple of times by your representative concerning this accident, but never have we been offered any definite settlement. Such things are unfortunate for all concerned, but in this particular, Mrs. Stanger is still under a Doctor's care, and to say the least it has been painful and trying.

It would be pleasant to be able to feel that our business is being appreciated and that we could boost and be a good will solicitor for your System.

Surely with the trucking situation becoming such a problem, the more satisfied customers you have the better are your chances for continued success.

The writer would very much like to bring to a satisfactory conclusion the problem that is now confronting us, resulting in a relationship that would tend to increase your tonnage and revenues instead of being short-hauled, penalized, and criticized, which is the general thing when discontent prevails. If this matter has to find its conclusion in the Courts, the Union Pacific will be the one to suffer financially in the long run.

If it becomes impossible to reach a mutual and satisfactory understanding with your representative after you've had time to give this your consideration, the writer, regardless, trusts that the New Year will be a happy and pleasant one to you.

Very truly yours,

(sgd.) A. G. STANGER

Mgr.

Idaho Falls (Bonded) Warehouse Company
AGS:em

[Endorsed]: Defendant's Exhibit No. 2. Admitted Oct. 20, 1941. [311]

PHYLLIS STANGER

Called as a witness on behalf of the plaintiffs after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Bowen.

Q. State your name? A. Phyllis Stanger.

Q. Where do you reside? A. Idaho Falls.

Q. Are you the wife of A. G. Stanger?

A. I am.

Q. You were his wife in January 1940.

A. Yes sir.

Q. How long have you and Mr. Stanger been married? A. Ten years.

Q. How many children do you have?

A. Three.

Q. Did you leave with your husband from Idaho Falls, on January 13, 1940 to take a trip toward Denver? A. I did.

Q. What kind of a train did you ride on?

A. The Union Pacific.

Q. A passenger train? [126] A. Pullman.

Q. Directing your attention to the 14th of January 1940, did you,—before the train you were on reached Denver do you recall anything happening?

A. I do.

Q. Just tell us how you were seated in the car?

A. I was going with the train on the west side of the car.

Q. Which way was your face? A. South.

(Testimony of Phyllis Stanger.)

Q. Toward the front of the train?

A. Toward the front of the train.

Q. Where was Mr. Stanger?

A. Opposite me, facing north.

Q. What were you doing at that time?

A. Playing bridge.

Q. What occurred just before this train reached Denver?

A. We had an accident. The car started,—the first thing we knew, there was a violent rocking back and forth of the train and before any of us had time to help ourselves it was crashed into the borrow pit. I was thrown against the table and then toward the side of the car.

Q. What table was it that you were thrown against?

A. The bridge table that we were playing bridge on.

Q. Describe what held that table up, was there any attachment? [127]

A. Fastened into the wall with a leg on the other side.

Q. Was it securely fastened to the wall?

A. It seemed to be.

Q. What portion of your body struck the table?

A. It struck me in the abdomen.

Q. Do you recall where else you were thrown?

A. Yes, as I hit the table it pushed me against the side of the car, and threw me against the car, my right side against the car.

(Testimony of Phyllis Stanger.)

Q. Do you recall and can you describe any cuts or injuries you received?

A. Yes, I got a cut on the leg at that time.

Q. Describe the interior of the car after you came to a stop.

A. As much as I could tell was there there was dirt, bolts and broken parts on the floor and the sides where the seats were, that is, the seats were jammed together, it was an awful mess.

Q. What happened to you after the car stopped?

A. I must have had hysterics. I laid there for a while until Mr. Hurst and Mr. Bush and Mr. Stanger helped me up. He helped me out of the car with the assistance of the other men. I had a terrific pain in the abdomen at that time.

Q. Were you able to walk out of the car?

A. I was assisted out of the car. They held my arms. [128]

Q. They assisted you out of the car?

A. Yes sir.

Mr. Anderson: I think that is leading, but go ahead.

Q. How were you assisted out of the car?

A. Mr. Stranger took one arm and Mr. Hurst the other.

Q. You were assisted, and where to?

A. To the door of the car. Mr. Hurst climbed out and assisted me out with the aid of the other men.

(Testimony of Phyllis Stanger.)

Q. And what happened then?

A. At that time we stood around. I had to have medical treatment. I had to get some treatment and Mr. Stranger had to get some help, a condition had started.

Q. What was that condition.

A. I started flowing. I had just finished my monthly period two or three days before we started the trip.

Q. What was the condition of the weather?

A. It was cold and there was snow. It was bitter outside.

Q. Did you go in to Denver from the scene of the wreck?

A. Yes sir, Mr. Stanger hired a car to take us to the station at Denver.

Q. Where did you go in the station?

A. To the ladies dressing room to see what I could do. I got into my things to see what I could do. I found a lot of things spoiled by some lotion that was broken. [129] At the time the railroad man who we were supposed to be the guests of during the day took us to their home and they called the road Doctor and he put some mercurochrome on my leg and something to stop this excessive flowing.

Q. What did you do then?

A. Rested for a while and they took us to the train to go to Houston.

Q. You went to Houston.

A. Yes sir.

(Testimony of Phyllis Stanger.)

Q. How did you go? A. On the train.

Q. In a Pullman? A. Yes sir a Pullman.

Q. What was your condition during the rest of the time, that trip to Houston?

A. I was very nervous and not able to sleep at all the first night. It was a business trip and of course Mr. Stanger had to attend some meetings, it was a business proposition with him, and while he attended the meeting I stayed at the hotel, I attended no meeting. I stayed at the hotel most of the time.

A. Why were you unable to sleep?

A. I had the sensation that we were having a wreck all the time.

Q. You accompanied Mr. Stanger on the entire trip, down to Mexico City? [130]

A. Yes sir.

Q. What was your condition during the remainder of the trip?

A. It was very miserable. We had planned to stay a week. I think we arrived there on Sunday evening and left Wednesday morning.

Q. You came back home then?

A. Yes sir.

Q. Do you remember the date you got back home?

A. About the 29 or 30th of January, we were gone about two weeks.

Q. What did you do after you got back home?

A. I was,—I knew that I had to have treatment.

(Testimony of Phyllis Stanger.)

I stayed in bed most of the time to see if I couldn't check it and finally went to the Doctor about two weeks after our trip back.

Q. Did that condition of flowing continue from the time of the wreck until you——

Mr. Thompson: Now up to this point this question is very leading and I object.

The Court: Yes, it is leading.

Mr. Bowen: I will try to reframe it.

Q. State what your condition was from the time of this wreck, the time it occurred until you went to the Doctor?

A. I continued this flowing and it became worse and worse. As time went on the nervous condition got worse and when I went to Doctor Hatch he tried methods that had—— [131]

Mr. Thompson: We object to this now, as not being responsive.

The Court: She may go ahead, maybe she has answered the question, but she may go ahead.

A. The Doctor tried to take care of me at that time and instead of the condition improving it still got worse. I became more nervous and excited and couldn't sleep at night.

Q. What Doctor did you go to?

A. Doctor Hatch. Ray Hatch.

Q. Prior to the time that this wreck occurred Mrs. Stanger did you maintain a home in Idaho Falls? A. Yes sir.

(Testimony of Phyllis Stanger.)

Q. Did you look after your house and do your work? A. Yes sir, I did all my work.

Q. Did you do your work without hired help?

Mr. Anderson: All of this is leading and suggestive.

The Court: Sustained. It is leading.

A. Did you do your own housework prior to the time you left on this trip? A. Yes sir.

Q. After you got back did you do your housework? A. No, I had help.

Q. For what period of time?

A. I had help all of the time. Continually until last three [132] days when I planned to go to Salt Lake City with a sick boy. I had help up to that time continually.

Q. Do you know who paid the help you had?

A. I did.

Q. Do you know how much you paid her?

A. I know how much I paid in money.

Q. That is what I want.

A. Ten dollars the first year and then seven to ten dollars but at the same time I boarded and roomed her.

Q. Doctor Hatch,—did he operate on you?

A. Yes sir.

Q. Do you remember the day of the operation?

A. Yes sir.

Q. What was the date? A. July 9.

Q. What year? A. 1940.

(Testimony of Phyllis Stanger.)

Q. Has that condition improved since the operation?
A. Yes.

Q. In what respect has it improved?

A. The hemorrhage has entirely stopped.

Q. Now, have you lost any weight since this accident?
A. I have lost about fifteen pounds.

Q. Previous to this trip in January 1940 what was your physical condition? [133]

A. My physical condition for three months previous had been perfect. I was in better condition than I had been for a long time. About three months before I had been to a Doctor because my period which was normally four days had gone into about a seven day period. He checked me up and I had been in perfectly normal health.

Q. That was how long you say that you had been healthy and normal?

A. About three months.

Q. Has Mr. Stanger complained about pain in any part of his body since this wreck?

A. Yes sir.

Q. What portion of the body has he complained about?

A. Experiencing extreme pain in the back.

Q. How often has he made this complaint?

A. Very frequently, and it is getting worse every day.

Q. Do you know whether he has come home during office hours?

A. Yes sir, it was unheard of before, but he

(Testimony of Phyllis Stanger.)

comes home now sometimes two and three times a day to put heat on his back.

Q. Prior to this accident what was his physical condition? A. It was very good.

Q. Did he ever have to come home and apply heat to his back? A. No sir.

Q. Did you ever hear him complain of pain in his back prior to the wreck? [134]

A. No sir.

Q. Did you experience any nervousness at that time? A. Prior to the wreck.

Q. I will ask you if you experience any now?

A. I still do.

Q. Do you have any difficulty sleeping at night?

A. Very much.

Q. At this time? A. Yes, very much.

Mr. Bowen: I think you may take the witness.

The Court: We will recess for ten minutes.

3:45 P. M. Oct. 20, 1941

The Court After considering this exhibit "1" the report of the Doctor. I am informed that a part of that is in the German language, if so then of course it will have to be interpreted because it may be pertinent.

Mr. Witty: If neither of us have it interpreted then I guess it will go in as it is.

The Court: Unless counsel agree that it doesn't relate to any regular record of the patient or have any bearing on this matter. I will have to have this

(Testimony of Phyllis Stanger.)

matter cleared up before the case is closed. I think I should inform you of that now.

Mr. Witty: May we take the exhibit during the recess of the Court. If we may take it until tomorrow to submit it to someone to interpret. [135]

The Court: Yes, you may do that.

Cross Examination

By Mr. Anderson:

Q. Mrs. Stanger, you were sitting in the right hand seat of the Pullman car?

A. Yes sir, going east.

Q. Toward Denver? A. Yes sir.

Q. Who was in the seat with you besides Mr. Stanger? A. Mr. Bush and Mr. Hurt.

Q. Where do they live?

A. Mr. Hurst is in Caldwell and I don't know where Mr. Bush is.

Q. Who was next to you? A. Mr. Bush.

Q. He was next to the window?

A. I was next to the window.

Q. Isn't it a fact that you were on the left hand side?

A. On the right hand side next to the window.

Q. Mr. Stanger was across from you?

A. Yes sir.

Q. What time did you get into Denver after this accident? A. I can't say definitely.

Q. About noon?

(Testimony of Phyllis Stanger.)

A. That is according to how long it took the car to get us in there. [136]

Q. You went out to some friends, the Colorado and Southern representative?

A. I had not met them previously. They were railroad people and they invited us as their guests that day.

Q. You went to their home?

A. Yes sir, that day.

Q. You went to a horse show that evening.

A. That afternoon.

Q. And back to their house?

A. Yes, and had dinner.

Q. Did you have dinner at the Denver Athletic Club?

A. Had dinner at their place before we went to the Horse show and then had dinner again at the Athletic Club after the horse show.

Q. You went to the train after that?

A. Yes sir.

Q. And went to Houston?

A. Yes, sir.

Q. And got there the following or the second morning?

A. Were in Houston on Tuesday morning.

Q. And you were there for three or four days?

A. Until Friday.

Q. And then went down to Old Mexico?

A. Yes sir. Arrived in Mexico City on Sunday and left on Wednesday. [137]

(Testimony of Phyllis Stanger.)

Q. And then went back to Los Angeles?

A. Yes sir, and then home.

Q. Did you remain in Los Angeles for some time?

A. Just between trains.

Q. What was the condition of the weather at the place of this derailment?

A. Freezing with snow on the ground.

Q. Before you left on this trip you went to a physician for treatment?

A. Yes sir.

Q. Who was the physician?

Q. Hoyt Wooley.

Q. What was your condition at that time?

Q. My periods had lasted four days and I was beginning to run into seven or eight days and I went to see him for that.

Q. Had you been to other Doctors for similar treatment?

A. No sir.

Q. Had you been to Doctor Miller?

A. He had taken care of me when I had the baby. Since then I had not been to him.

Q. Had you been to any Doctor for similar treatment given by Doctor Wooley?

A. No sir.

Q. Doctor Miller was your family physician?

A. Yes sir. [138]

Q. And was when your child was born?

A. Yes sir.

Q. He has been your family physician for some time?

A. Yes sir.

Q. How many children do you have?

A. Three.

(Testimony of Phyllis Stanger.)

Q. How old is the oldest? A. Nine.

Q. And the next? A. Six.

Q. The next? A. Two.

Q. All boys?

A. No sir the last one is a girl.

Q. You never had any assistance in your home?

A. No sir, except when I came home from the hospital with a baby.

Q. How big a home do you have?

A. A big five room home.

Q. Do you have any objection to Doctor Wooley testifying in this case? A. No sir, none at all.

Q. Or Doctor Miller.

A. No, sir.

Q. You have been troubled,—before you went to Doctor Wooley you were troubled with excessive flowing and [139] had been since the birth of your last child.

A. Not excessive but longer than most of my periods.

Q. It was over the normal period.

A. Yes sir, my normal.

Q. Could you tell me about how many days over the normal period?

A. As a rule my normal period was four days and this would be about a week.

Q. You have never gone to Doctor Miller at all to have this condition corrected? A. No sir.

Q. He had never planned on performing this same kind of operation that Doctor Hatch performed? A. Never.

(Testimony of Phyllis Stanger.)

Q. Doctor Wooley had never made an examination?

A. No sir, he never made an examination.

Q. He was giving you treatments?

A. Liver shots.

Q. To stop this flow of blood?

A. Yes sir, and it stopped it.

Q. He couldn't examine you while that condition existed? A. No sir.

Q. About October 10, Doctor Brothers examined you at Idaho Falls. A Doctor from Pocatello examined you at Idaho Falls?

A. I think it was that time, about the 9th or 10th. [140]

Q. You told him that you had had excessive menstruation periods ever since the last child was born?

A. I said I had gone over my normal menstruation period.

Q. Prior to the birth of this last child you were in the hospital for what they termed toxemia pregnancy?

A. I was in there I don't know the name of it.

Q. It was concerning pregnancy?

A. It was a sickness of the stomach, they had been feeding me and I couldn't keep it down.

Q. They said you had a threatened abortion?

A. That was in September 1938.

Q. And you had excessive flowing?

A. It was one night and then I stopped.

(Testimony of Phyllis Stanger.)

Q. Did you flow at all while you were pregnant with the other children? A. Never.

Q. When you went to Doctor Wooley did you have any—before you went on this trip tell me the symptoms other than flowing?

A. That was all.

Q. Were you nervous? A. No sir.

Q. Easily fatigued?

A. Not fatigued, I just felt that I was flowing too long.

Q. You were tired and run down? [141]

A. Still doing my work.

Q. Still run down. You felt different than normal.

A. I didn't feel that I was picking up as fast as I should.

Q. You did have some nervousness.

A. Not excessive.

Q. You did have some nervousness?

A. If I got over-tired.

Mr. Anderson: That is all.

Redirect Examination

By Mr. Bowen:

Q. Mrs. Stanger, you said you had some nervousness before you called Doctor Wooley. How did that degree of nervousness compare with the nervousness since this wreck?

A. I would not say that I was nervous at all compared to what I have been since the wreck.

(Testimony of Phyllis Stanger.)

Q. How long was it prior to the date that you went on this trip that you had last called on or been treated by Doctor Wooley.

A. I think the last time was the last of October or the middle of October. I went for a check-up and I was O. K. then.

Q. Did he tell you it was cleared up?

A. He said it was all cleared up.

Q. And from your own knowledge, was it cleared up? A. Yes sir. [142]

Q. All Doctor Wooley did was to give you some shots? A. Yes sir, Liver shots.

Mr. Bowen: That's all, thank you Mrs. Stanger.

Mr. Anderson: That is all. [143]

J. H. LYNN

Being called as a witness on behalf of the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Bowen:

Q. State your name please?

A. J. H. Lynn.

Q. What is your business or profession, and also give your residence, Doctor.

A. Pocatello, I am a physician.

Q. Are you regularly licensed to practice medicine and surgery in the State of Idaho?

A. Yes, I am.

(Testimony of J. H. Lynn.)

Q. Do you have your own hospital here?

A. I do.

Q. How long have you practiced medicine and surgery in the State of Idaho?

A. Since 1915.

Q. Assuming a man,—withdraw that please,—are you a graduate of any recognized school of medicine? A. I am.

Q. Can you tell us of any post graduate work or experience you have had?

A. Yes, eighteen months post graduate work in New York, interne preparation in Chicago. [144]

Q. Assuming that a man forty-one years of age, athletic, strong, able to perform his work in January 1940, and in good health. Assuming that on January 14, 1940 he would be riding in a passenger pullman car on a passenger train moving at a fast rate of speed; that he was sitting with his back in the direction the train was going, playing cards; that they were regular pullman seats, with cushions; that the train and the car he was in was suddenly derailed, the end of the car went into the borrow pit; that he would be thrown into the corner of the seat in which he was sitting, in a sitting position but bent forward, and otherwise thrown around in the car; that after the car came to rest he crawled out of the car and assisted the other people out of the car; that he walked over on the highway a short distance away and hailed a passing automobile and rode for a distance of approximately thirty

(Testimony of J. H. Lynn.)

miles in cold freezing weather; that he remained in a private home during the remainder of that day and that he left the City of Denver in the evening of that day around eight or nine o'clock on a pullman car; that shortly after the accident or immediately after, he complained of pain in his back, the upper portion of his spine that he traveled from Denver Colorado to Houston Texas by Pullman car; that he was unable to sleep or rest during the trip; that he remained at Houston approximately [145] three days and left by pullman, going to Mexico City and remained there three or four more days; from there he traveled to Los Angeles, and from there home; that he had, during that time, suffered pain in his back; that he arrived home the latter part of January 1940, and continued to suffer pain; that during the summer months, the extent is not known, he played some golf sometimes he played as much as nine holes without resting and other time this pain would be severe and he would have to lie down on the ground and conclude that game,—quit entirely; that he was able to play some golf this year, however, not as much as last year, with the same condition present as to having to lie on the ground during the time he was playing. Sometimes his right leg would become numb and pain him; that it was at intervals; that the pain in his back was not constant but would come on at intervals; that on some occasions that he was at his office,—he was engaged in office work, generally

(Testimony of J. H. Lynn.)

walking around and at times his back would become so painful that he would have to go home three or four times a day and put heat on his back or take a hot bath; that it would relieve this pain. Assuming that this pain continues, not constantly but at intervals up to the present time. Now, Doctor, in your opinion as a professional man would the accident, and the injury as I have outlined [146] be caused from an injury received in that wreck?

Mr. Thompson: Now we object on the grounds, First; that it is leading and suggestive. Second; It does not constitute a complete and correct statement of the record in this case. Third; that it is not expert in character, but is usurping the province of the Court.

I think the most recent United States Court decision is the Spaulding case of which Your Honor knows.

The Court: There is some question as to whether it is a complete and substantial statement of the evidence produced relating to the party you refer to. I recall some instances which were not repeated in your question. I don't understand that the Court has changed the general rule that if one is qualified in a certain line and a substantial statement is given him, I don't understand that the Spaulding case goes so far as to say that he cannot give his opinion. I think we will recess at this time until tomorrow morning and I will think this over during the evening.

October 21, 1941 10 o'clock A.M.

The Court: The objection to the witness now on the stand expressing an expert opinion based upon a hypothetical question in which there is narrated an assumed state of facts presented in the evidence, [147] presents the thought here as to whether an expert opinion can be received, such as the one attempted here, which is, "you may state if in your opinion as a professional man the injuries received could be from this wreck", I think that is about the wording of the inquiry. The inquiry then is, does this expert opinion present the ultimate issues to be decided by the Court upon all of the evidence as it is alleged in the complaint and denied in the answer. This question has been presented to the Supreme Court and also to the Ninth Circuit Court of Appeals in war risk insurance cases in which a hypothetical question was propounded to a physician quoting the facts in the case and attempting to elicit the opinion as to whether the injury was total, or amounted to total and permanent disability as provided before he could recover. The Supreme Court reached the conclusion in the Spaulding case that such an opinion could not be obtained from an expert because it was invading the province of the jury or the Court and was attempting to decide the ultimate issue in the case, which of course, is the province of the Court or the jury and is not a subject for expert opinion. Our Ninth Circuit Court of Appeals in a case that

went up from this District, I think the Stevens case. Before that time it was the rule that such a question could be asked and answered but they laid down the rule [148] that this inquiry could not be made as it was the ultimate issue for the jury or Court and to be decided by the Court of jury.

This question now, is asking a Doctor who never examined the plaintiff at all, upon an assumed state of facts to express an opinion as to the injuries alleged to have been caused by this accident. This is analogous to asking whether an injury is total and permanent. Did this accident cause these injuries, it is the same thing, the ultimate question here is did the Plaintiff receive the injury or any injury by reason of this accident. The same question as involved in the war risk insurance cases, as I review the Spaulding and the Stevens cases I think this is objectionable. Sustained.

Mr. Bowen: Is it necessary to ask for an exception.

The Court: There seems to be some question but you will be allowed an exception and there will be no question about it.

My attention has been called to exhibit "1" there was some question as to whether it was written in the German language, now, I am advised that it is not, it may be a little difficult to read but it is in English. Does Counsel have anything to say about that. If not we will not pursue it further. The exhibit was admitted. [149]

A. G. STANGER

Being recalled as a witness for the plaintiffs having heretofore been duly sworn, testifies as follows:

Cross Examination

By Mr. Anderson:

Q. I think you mentioned a number of *Doctor*, did you mention Doctor Warren or Warner who treated you?

A. I received treatments from Doctor Waner.

Q. He is a chiropractor or osteopath?

A. I don't know.

Q. Doctor Call is a chiropractor?

A. I think he is a chiropractor or osteopath.

Q. Doctor Rogers is also a chiropractor.

A. Yes sir.

Q. And lives at Pocatello? A. Yes sir.

Q. I believe you were away during the entire month of June 1940 were you not, to a convention in California, at Fresno. [150]

A. No sir, I was in Fresno but not on a convention.

Q. You were there in June 1940.

A. Yes sir.

Q. You and Mrs. Stanger drove down in an automobile. A. Yes sir.

Q. Were gone most of the month.

A. No sir, about ten days.

Mr. Anderson: That's all.

(Testimony of A. G. Stanger.)

Redirect Examination

By Mr. Bowen:

Q. Have you requested Doctor Rogers to come here and testify? A. Yes sir.

Q. Did he say he would?

A. He said he would be glad to do so but his health was so bad that he was afraid it would be disastrous.

Mr. Bowen: That is all.

Recross Examination

By Mr. Anderson:

Q. He is attending to his business affairs.

A. I cannot say as to that.

Q. When did you last see him?

A. I had a treatment last Sunday.

Q. He was at his office. A. Yes sir.

Mr. Anderson: That is all.

Redirect Examination

By Mr. Bowen: [151]

Q. What did he treat you for. What did he do?

Mr. Anderson: Object to that as not proper redirect examination.

The Court: Sustained.

Q. On this trip to California did you suffer any pain in any part of your body?

Mr. Anderson: Objected to as not proper redirect examination. The only thing he was asked about

(Testimony of A. G. Stanger.)

was his absence from California,—rather his absence from Idaho Falls.

The Court: Sustained.

Mr. Bowen: That is all.

Mr. Anderson: That is all.

Mr. Bowen: And at this time the plaintiff rests.

[152]

GEORGE O'RULLIAN

Being called as a witness on behalf of the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Anderson:

Q. State your name?

A. George O'Rullian.

Q. Where do you reside?

A. Idaho Falls Golf course.

Q. What is your business or profession?

A. Golf Professional.

Q. Is the Idaho Falls Golf course a city course.

A. Yes sir.

Q. You are the professional there?

A. Yes sir.

Q. How long have you been so employed?

A. Six years.

Q. Generally what do you do as a professional there?

A. Well there are quite a number of duties, the

(Testimony of George O'Rullian.)

main ones are to manage the club house, give golf lessons, promote golf and have charge of the grounds around the club house.

Q. Do you have charge of figuring the handicaps of the players? A. Yes.

Q. The players who take part in tournaments.

A. Yes sir. [153]

Q. And also arrange tournaments?

A. Yes sir.

Q. Are you acquainted with Mr. A. G. Stanger? A. Yes sir.

Q. He plays golf on the Idaho Falls Course where you are the professional?

A. Yes sir.

Q. Have you given him lessons?

A. Yes sir.

Q. State whether or not,—have you observed him playing also? A. Well, yes, I have.

Q. State whether or not in the lessons you have given him and in his play you have observed whether he has performed as an ordinary person?

Mr. Bowen: Objected to as incompetent, irrelevant and immaterial and calling for a conclusion of this witness and no proper foundation is laid.

The Court: Sustained.

Q. Can you tell me what Mr. Stanger's handicap is?

A. Yes, he has a handicap of fourteen.

Q. For what year?

A. 1939, 1940,—no, 1940 and 1941.

Q. Can you, from that handicap tell us approximately what his score is for nine or eighteen holes.

(Testimony of George O'Rullivan.)

A. From the way we figure our handicap, at fourteen on a 3/4 handicap basis it figures about 45 for 9 holes [154] or 90 for 18 holes.

Q. As average golfers go, is that a fair score?

A. Yes, it is an average score.

Q. Is there any physical effort or exertion used or necessary in playing golf?

A. Well, yes there is a physical effort to swinging the club. We try to teach a person to relax as much as we can in teaching them to swing.

Q. And to follow the swing through?

A. Yes sir.

Q. State whether or not that necessarily results in turning the back and twisting the back.

A. It requires a hip action. In the golf swing the hips and hands get most of the work.

Q. There is a swing of the shoulders and the back with the hips?

A. You pivot through the hips, and the actual swinging is through the hands.

Q. Is that a nine or eighteen hole course?

A. It is an eighteen hole course at the present time. We opened up the eighteen holes last year. It was nine before that.

Q. What is the yardage of that course?

A. The first nine is 3339 yards.

Q. For the first nine holes?

A. Yes sir. [155]

Q. And for the second nine?

(Testimony of George O'Rullivan.)

A. It is 3432 yards as near as I remember. No, the second nine is shorter than the first nine by about two hundred yards, I know it is around two hundred yards, that may be off two or three yards but that is close.

Q. Are you acquainted with the Sun Valley golf course? A. Yes sir.

Q. Have you ever played that?

A. Yes sir.

Q. Describe the topography of that course, as to whether it is hilly or level?

A. It is quite hilly, more hilly than the average run of golf courses.

Q. What makes it more,—let me ask, are there rivers or creeks?

A. Yes sir, you cross a creek several times and shoot down into a canyon and a couple of places there that you shoot up the hill.

Q. Is that quite a steep hill that you shoot up?

A. Yes sir, quite a steep hill.

Q. State whether or not in going up that hill,—going up to the green it is necessary to wind around a trail?

A. You walk down across a bridge and then up some steps to the green, you walk down first, and then up.

Mr. Anderson: That is all, you may cross examine. [156]

(Testimony of George O'Rullian.)

Cross Examination [156]

By Mr. Bowen.

Q. Isn't it true that during this year, 1941, on the Sun Valley course they would not allow you to play that up-hill hole?

A. I don't know about that, except that I was there about three weeks ago and we played it. If it is the hole I am thinking of, it is a short hole and you shoot over the creek, a three par hole I believe.

Q. In the early part of the year do you know whether they would allow anybody to play that hole?

A. I don't know. I know that we did as I told you. I know that they were on temporary greens in the fore part of the season and they went into July before they had them on the regular greens. I cannot say about that particular hole.

Q. It may be true that they would not let that hole be played?

A. It is possible.

Q. Did Mr. Stanger play as much golf in 1940 as he did in 1939 at the Idaho Falls Course.

A. I haven't the record of that. The City Clerk has the record on that. I wouldn't know off hand. You say in 1940 and 1939?

Q. Yes.

A. I cannot say as to that.

Q. Would you know if he played as much in 1941 as he did [157] in 1940?

A. I don't think he played as much this year as he did last year. I didn't see him as much.

Q. You were there constantly?

(Testimony of George O'Rullian.)

A. I am there most of the time.

Q. You don't attempt to say that Mr. Stanger was not suffering pain in his back while he was playing?

A. I don't know. I wasn't around him a great deal. I am with a number of golfers during the day. I don't go and talk to any one person and find out how they feel and so forth. It is just a passing hello, how are you, that is about all there is to it.

Q. You didn't observe him,—that is, you don't observe any of them constantly as they play?

A. No sir.

Q. Do you know whether or not Mr. Stanger in 1940 and 1941 took milk with him to drink, or whether he drinks milk at the club house?

A. I know that he had milk at the club house.

Q. Has he made any complaints of his back hurting him, to you?

A. No sir, he didn't say anything to me, to my knowledge, of course he might have and I would forget it, but I don't recall it now.

Q. You would not say that he had or had not?

A. I cannot say. It is one of those things that is hard to remember, he may have said something and I had forgotten. [158]

Q. As to whether during the time he would be playing this course whether he would lie down and rest, what about that?

(Testimony of George O'Rullian.)

A. I wouldn't know as to that, because I wasn't playing with him.

Q. Do you happen to know from your personal knowledge whether Mr. Stanger has ever quit a game during the course of the game because of his back?

Mr. Thompson: Objected to as calling for a conclusion of the witness.

The Court: Unless he knows.

A. I really don't know.

Q. I think I understood you to say that in playing golf, that the hitting of the ball requires a hip action. You said that to swing the hips and hands do most of the work? A. That is right.

Mr. Bowen: That is all.

Redirect Examination

By Mr. Anderson.

Q. Explain to the Court just how you swing in playing golf.

A. This is just briefly because there is a lot of things to take into consideration, but the fundamental points to make up a good golf swing is the grip and the pivot action, the action of the hands and wrists and—well maybe if I put it to you in a different way,—in hitting a golf ball it requires the same action as cracking a whip, [159] the pivot is what keeps the body in position while you swing the club around, because the entire swing without that is very short. As you swing and come down

(Testimony of George O'Rullivan.)

you come into the ball and you develop that sweep through in the pivot as you come into the ball with the hands and wrists.

Q. Assume that you have a driver, when you drive off the tee, just make a regular swing, go through the motions for us.

(Witness demonstrates.)

Q. When you make the swing, the head of the club is in *front you* and next to the ball?

A. Yes sir.

Q. As you start the swing where is the head of the club?

A. Like this, about in this position (indicating).

Q. About three fourths through the swing it would be in what position?

A. The forward swing would be completed.

Q. And from the back swing before you start the down swing again it has made about three fourths of a circle?

A. Yes sir.

Q. And in that motion there is a pivot of the entire body, as you bring the swing through?

A. It would be mostly through the hips, and the left shoulder would come in line with the ball when you start, so that would be half way round. [160]

Q. There is a complete rotation of the entire body?

Mr. Bowen: Objected to as leading and suggestive.

The Court: It is leading. Sustained.

(Testimony of George O'Rullivan.)

Q. State whether or not in making this swing,—withdraw that,—state what the fact is when you make a back swing, and upward swing, whether the entire back moves and rotates?

A. You get most of that through here (indicating) in going back, and in going through with the swing you have a full turn this way (indicating).

Q. State whether you first twist your shoulders and twist your back?

A. Yes, first to the right and then to the left going through with the swing.

Mr. Anderson: That is all.

Recross Examination

By Mr. Bowen.

Q. All of the pivoting that you demonstrated is in the hips.

A. That is one thing that we try to stress in good form is to pivot through the hips.

Q. That is one of the main objectives of an instructor to see that is where the pivot takes place?

A. That is where the pivot starts.

Mr. Bowen: That is all.

Redirect Examination [161]

By Mr. Anderson.

Q. That is what you endeavor to teach?

A. Yes sir.

Q. State whether or not all golfers perform in that fashion?

(Testimony of George O'Rullian.)

Mr. Bowen: Objected to as calling for a conclusion, asking as to what all golfers do.

The Court: Sustained.

Mr. Anderson: That is all.

Mr. Bowen: Nothing further.

LEE WALKER

Being called as a witness on behalf of the defendant, after being first duly sworn testifies as follows:

Direct Examination

By Mr. Anderson.

Q. State your name? A. Lee Walker.

Q. Where do you reside? A. Idaho Falls.

Q. What is your occupation?

A. Clerk,—City Clerk of the city of Idaho Falls.

Q. How long have you been City Clerk?

A. About nine years.

Q. As City Clerk do you have under your care and custody the register of the golf course, showing who plays at the golf course at Idaho Falls?

[162]

A. Yes sir.

Q. I observe that you carried in a bundle of records, are those the records for 1939, 1940 and 1941?

A. The golf register sheets for 1939, 1940 and 1941.

(Testimony of Lee Walker.)

Q. Have you taken off, or made a summary of the number of rounds, together with the dates played by Mr. A. G. Stanger in the years 1939, 1940 and 1941? A. I have a record here.

Q. You have made such a record?

A. Yes sir.

Q. That is a summary?

A. Yes, showing the dates and the number of rounds for the three years.

Q. I show you what has been marked as defendant's exhibit "3" and I will ask you what it is?

A. This is the year 1939, the record for the year 1939.

Q. But the exhibit consists of four sheets.

A. Yes, two sheets for 1939 and one for 1940 and one for 1941.

Q. State whether or not that is a correct summary of the rounds played by Mr. A. G. Stanger, that you have taken from the original records?

Mr. Bowen: Objected to as calling for a conclusion of the witness and would be hearsay and incompetent, it is not shown who made the original records.

The Court: He said that he is the City Clerk [163] and the custodian of the records and the records cover this inquiry. This is the same situation as an auditor may make a summary and set up what he finds. These are public records I understand.

A. Yes, these are taken from the original records.

(Testimony of Lee Walker.)

The Court: You have offered them Mr. Anderson.

Mr. Anderson: Yes, Your Honor.

Mr. Bowen: May I ask a few questions on this exhibit before it is ruled on.

The Court: Yes, you may do so.

By Mr. Bowen:

Q. Referring to defendant's proposed exhibit "3" who makes up that record in the first instance?

A. The golfers sign the original records, the register.

Q. Who makes this record?

A. It is made up by whoever plays golf.

Q. You don't know whether they made them up correctly or not?

A. Well, they have to sign in when they play.

Q. Do you know whether they made them correctly or incorrectly?

A. I cannot say as to that.

Q. What happens after that, I mean, to the record.

A. The manager of the golf course turns them to me, to my office once a week.

Q. Are they handled by different persons?

A. Just the manager of the golf course. [164]

Q. Who handles them before you see them?

A. The starter and the golf course manager.

Q. You don't see them until they come to your office?

A. The only time is when I go to the golf course.

(Testimony of Lee Walker.)

Q. As to whether the contents are true or not of your own knowledge Mr. Walker?

A. That is what we have a man there for to make them.

Q. Do you know whether the contents are true, of your own personal knowledge? A. Yes sir.

Q. Are you sure?

A. Well, no, but we have a cash register out there that checks everybody.

Q. That is the only reason you know?

A. And we have an auditor that checks all the records.

Q. Who is the auditor?

A. Mr. Fred Ring.

Q. Does he do that before you get the records?

A. After I get them.

Q. Does his audit appear on this exhibit?

A. No sir.

Q. There is no audit connected with this?

A. Yes sir, he checks them.

Q. Is it frequently the case that players play there and do not register?

A. There are two men there to register them.

[165]

Q. Do you know whether it is true or not?

A. No, I am not sure of all of it.

Q. You don't make the original records?

A. No sir.

Q. And they are not made under your supervision? A. No sir.

(Testimony of Lee Walker.)

Q. They are turned over to you?

A. Turned to my office once a week.

Q. Who handles them after that?

A. Just the auditor when he checks them.

Mr. Bowen: We object to exhibit three, the year 1939 is outside the issues in this case. There is nothing in this case bearing on the year 1939. We object to the entire exhibit as being incompetent, irrelevant and immaterial, and not the best evidence. It is calling for a conclusion of this witness as to what may be or may not be in this record.

Mr. Anderson: We will concede his objection as to 1939, and submit the exhibit as to 1940 and 1941.

The Court: You say you have a cash register, what do you mean by a cash register?

A. They keep a record each time someone registers they sign the record.

Q. What is that register?

A. A National cash register. This register shows all this information. [166]

Q. That is transferred to your office?

A. I get the tickets once a week.

Q. Mr. Anderson: The person who plays golf, state whether or not the person who plays golf registers for himself?

A. Most of the time, but sometimes the starter registers him.

Mr. Anderson: And the records that you have prepared were taken from these registers which you have explained which are kept in your office

(Testimony of Lee Walker.)

and under your supervision, which you check to determine the receipts?

A. That is where we check all of the receipts of the golf course.

Mr. Bowen: Do you have any paid up memberships?

A. We have some fifteen year playing privileges taken out in 1934.

Mr. Bowen: And the players who are paid up do they register?

A. They must all register, they all go through the register.

Mr. Bowen: We renew our objection.

Mr. Anderson: We submit that it shows now that they are made up in the regular course of business.

The Court: Overruled, I don't know of a more accurate way you could do that.

Mr. Anderson: Now, I would like to remove the sheets having to do with the year 1939. [167]

Mr. Bowen: We object to the removal of any part of it, the record would become incomplete, and for the further reason that the objection we made applies 1940 and 1941 as well as 1939. The Court will observe that he played more in 1939 than either in 1940 or 41.

The Court: But you raised the specific objection that the year 1939 record had no bearing to any issue here, and I don't see what I can do now except to allow the other two years in and sustain

(Testimony of Lee Walker.)

your objection as this is not within the issues here.

Mr. Bowen: As to the specific objection to the year 1939 I wish to withdraw that objection.

The Court: Yes, you may do that, and now the entire thing is before the Court.

Mr. Bowen: Now is the entire exhibit in.

The Court: Yes, I understood you to withdraw the specific objection and to state that there was some connection between 1939 and the other two years.

Mr. Thompson: We are glad to have the whole thing in.

The Court: It is admitted.

Q. Now, Mr. Walker, referring to exhibit "3" I observe that opposite the dates you have some instances of 9 and some of 18, will you explain what that means?

Mr. Bowen: Objected to, no let it go.

The Court: This record must show that at the [168] time the Court ruled on the exhibit that the witness tendered the original record for examination by counsel.

Mr. Anderson: Yes, they are here I believe.

The Court: I understand Mr. Witness that the records are here?

A. The records are all here for the three years.

The Court: Here in Court.

A. Yes sir.

Q. By Mr. Anderson: Now, you may answer the former question.

(Testimony of Lee Walker.)

(Question read by reporter)

A. Nine means nine holes, and eighteen marked on there means 18 holes, two rounds or one round.

Q. Explain a round of golf.

A. We call nine holes a round.

Mr. Anderson: That is all, you may examine.

Cross Examination

By Mr. Bowen:

Q. Directing your attention to this bundle of records, do you know which ones I refer to?

A. Yes sir.

Q. Did you yourself prepare those records?

A. No sir.

Q. Were those records prepared from any information that you have in your office as custodian of those records?

A. The records were prepared when they were turned in to my office. [169]

Q. They are not prepared under your supervision, or in your office?

The Court: He is asking what you do in the way of preparing these records. Maybe I can clear this up. I understand that you are the City Clerk?

A. Yes.

The Court: Of Idaho Falls.

A. Yes, sir.

The Court: Are you the custodian of all of the public records of the City?

A. Yes sir.

(Testimony of Lee Walker.)

The Court: Do those records consist of the summary which you have testified about?

A. Yes sir.

The Court: What do you record on that summary?

A. The records that are turned over to me and I check the cash receipts.

The Court: Are they filed in your office?

A. Yes sir.

The Court: Do they remain in your custody?

A. They remain in my office.

The Court: Now go ahead.

Q. Who prepared the information that you have to make up those records?

A. That comes to me from the municipal golf course.

Q. Who prepares it? [170]

A. The golfer signs the register and the manager or starter enters whether he plays nine or eighteen holes. Whether he pays a green fee, or plays on a monthly ticket or a season ticket.

Q. They pass through two hands before they come to your office?

A. Two hands at the golf course.

Q. Can you tell from your own knowledge whether those are correct or not?

A. They are true and correct records?

Q. From your own knowledge,—to your personal knowledge is the information contained therein true and correct?

(Testimony of Lee Walker.)

A. All those records are true as far as I know.

Q. Is my question clear Mr. Walker?

A. Yes sir.

Q. Can you answer it?

A. I say they are correct.

Q. You know they are correct? A. Yes.

The Court: It is a question now of whether you have traced these records from the time they register until the records get to his office. What happens from the time the player walks up and registers. Maybe it might require some further proof. There might be a gap left there. [171]

A. We use,—if I might explain. We have a golf register right next to the cash register, and the player signs that and if he has a monthly ticket, he gives that and no money is paid at the time,—

The Court: —What counsel says is that there is a gap between that time and when it reaches your office.

Mr. Thompson: My understanding of the record to this point is this. It has been testified here that the player comes and signs his name, that I believe was testified to by Mr. O'Rullivan, and that was corroborated by this witness. After the player has played his golf then one of the persons in charge there makes 9 or 18 to indicate the number of holes as the case may be. That record having been made these sheets are then brought to the office of the City Clerk. This man becomes the permanent custodian of the records. I am quite clear on this,

(Testimony of Lee Walker.)

and am sure that I am correct, that he has said that he has made a summary from the entries on that register of this man's signature with the number of holes played, that he has made a summary and that makes up this exhibit. The records are here for counsel to refer to and see if what the witness says is correct.

The Court: It is just a question of tracing the record from the time the player registers until it reaches this man's office. [172]

Mr. Thompson: This man has testified to the procedure.

The Court: Yes, I think the procedure is cleared up. Objection overruled.

Mr. Bowen: That is all.

Mr. Anderson: That is all.

ROBERT J. LEWIS

being called as a witness on behalf of the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Anderson:

Q. State your name?

A. Robert J. Lewis.

Q. Where do you reside Mr. Lewis?

A. Denver.

Q. What is your occupation?

A. Locomotive engineer.

(Testimony of Robert J. Lewis.)

Q. How long have you been employed as a locomotive engineer? A. Thirty-two years.

Q. Were you so employed in January 1940?

A. Yes sir.

Q. What points were you running between?

A. At that time between Denver and Cheyenne.

Q. Were you on the train on January 14, 1940 when it derailed? A. Yes sir. [173]

Q. You were the engineer on that train?

A. Yes sir.

Q. Where did that derailment occur?

A. Station called Houston.

Q. Houston, Colorado?

A. Yes sir, it is merely a side-track for the loading of sugar beets.

Q. How far from Denver?

A. About thirty-seven miles.

Q. State whether or not it is on the main line from Omaha to Denver?

A. Yes, on the main line.

Q. At what point does it connect with the main line from Cheyenne to Denver?

A. At LaSalle.

Q. How far from Houston to LaSalle?

A. Eight or nine miles.

Q. Toward Denver?

A. I don't quite understand.

Q. Is Houston toward Denver from LaSalle?

A. Yes sir.

(Testimony of Robert J. Lewis.)

Q. What time-table direction do you call Houston?

A. Houston is east of LaSalle by time-table direction.

Q. In traveling from Houston to Denver, that would be considered what direction? A. East.

[174]

Q. Was that a passenger train?

A. Yes sir.

Q. What was the number of it? A. Four.

Q. When did you first know that there was a derailment, or that a derailment had occurred that day?

A. When the air brakes applied to the emergency due to the dividing of the train?

Q. What did you do?

A. The procedure was to keep the forward portion of the train moving so that the rear end would not overtake the detached portion. I released the brakes on the engine by means of independent brake valves to keep the engine working steam to keep the portions of the train from coming together.

Q. After the train stopped what did you do?

A. I shut off the steam head which was blowing out through the broken steam pipe, and I went back to ascertain the cause of the derailment.

Q. How many cars were attached to your engine at that time? A. Four.

Q. What did you find?

(Testimony of Robert J. Lewis.)

A. Upon going back to the rear truck of the fourth car I found a broken wheel on the right side of the truck, the lead wheel of the rear truck on the rear end of the fourth car.

Q. Was that a coach? [175]

A. Yes, a coach.

Q. Were there any pullmans on that train?

A. I think we had one standard pullman in the train.

Q. Was that to the rear of the coach that had the broken wheel.

A. Yes sir, it was to the rear. I think it was the sixth or the seventh car in the train.

Q. State whether or not the engine and four cars remained on the rails?

A. Yes sir, the four cars that were still coupled to the engine and which had broken away from the wrecked part were still on the rails.

Q. Did you place your hand on the wheel that was broken?

A. Yes, and also on the other wheels on the truck to see if there was heat in those wheels and there was not, only the normal running heat.

Q. How fast was the train traveling as you went through Houston?

A. Between sixty and sixty-five miles, the normal speed for that train.

Q. Was the train late or on time?

A. Late leaving Cheyenne and at the time of the accident.

(Testimony of Robert J. Lewis.)

Q. Had you made up any time between Cheyenne and LaSalle? A. No, I had not.

Q. State whether sixty and sixty-five miles an hour was the usual running time of that train. [176]

A. Yes, that is the usual running time of that train.

Q. Had you made any station stops between Cheyenne and Houston?

A. Yes, that train being a local train, we made practically all of the station stops for the loading and unloading of express and mail.

Q. Had you made any emergency stops that morning? A. No sir.

Q. Were the brakes applied at all as you approached or passed through Houston?

A. No sir.

Q. State whether or not you observed anything any different in the way the train or the engine rode as you passed through Houston?

A. No defect in the track that was noticeable on the engine.

Mr. Anderson: You may cross examine.

Cross Examination

By Mr. Bowen:

Q. How long have you been an engineer over that particular track where the wreck occurred, prior to that time?

A. I have been running over that piece of track since being employed by the Union Pacific, that would be for thirty-two years.

(Testimony of Robert J. Lewis.)

Q. When you went back to where the wreck occurred, how many cars were off the rails?

A. There was a tourist car that was completely off the rails, [177] a standard pullman and a tourist car and I think one other and that was a tourist car back at the read end.

Q. The portion of the train that broke off had how many cars? A. Four.

Q. And three of the four were off the track?

A. Yes sir.

Q. Were the rails spread at the point of the wreck? A. Yes sir.

Q. The rails were spread? A. Yes sir.

Q. How much were they spread?

A. Well, the track was torn completely up due to the wreckage.

Q. Is it a part of your duty to make inspections of wheels on passenger cars just in the ordinary course of your duty Mr. Lewis?

A. No sir, it is not.

Q. That is not one of your duties?

A. No.

Q. As to when these wheels were inspected,—the wheel that broke,—as to when the wheels on that car were inspected and what the inspection consisted of, you don't know?

A. No, I don't know.

Q. How was the weather at that time? [178]

A. It had been snowing the night before. It was quite cold and there was three or four inches of snow on the ground.

(Testimony of Robert J. Lewis.)

Q. Do you recall the position of the pullman car after you got back after the wreck?

A. It was leaning over at quite an angle. It wasn't completely over, I don't think.

Q. Do you recall in the direction you were going, which side of the track the pullman car was off on?

A. To the right.

Q. Was it tipped toward the road?

A. What is the fact as to whether one end was higher than the other end?

A. I don't recall just the position of the cars, but I do know that they were laying at an angle.

Q. Tell us how deep the borrow pit was at the side of the track where this car was laying?

A. Just a slight embankment. There is not much there due to the grading of the track.

Q. The ground was frozen? A. Yes sir.

Q. Did you look inside the pullman car?

A. No sir, I didn't go into the pullman.

Q. Do you know where the trucks on the pullman were? A. Where the trucks were.

Q. Do you know where they were as to being under the car or off to the side? [179]

A. No sir, I cannot recall just where they were.

Q. What type of engine was on this train?

A. Type 484.

Q. Is that the regular type on that run?

A. Yes sir.

Q. How long had that been used on that run?

A. They had been used in passenger service since they came to the Union Pacific about 1939.

(Testimony of Robert J. Lewis.)

Q. As to the gauge of the track being wide or tight at the point of the wreck do you know about that? A. I don't know.

Q. Could have been tight or wide?

A. Could have been either, yes.

Q. When you say there was no defect, you didn't refer to that defect? A. No I didn't.

Q. Can you tell us the type or make of wheel that you spoke of as being broken? A. No sir.

Q. You didn't know how long it had been in service either? A. No sir.

Q. Do you know what became of the wheel after it broke? A. No sir.

Q. Have you seen the broken portion of the wheel since the wreck? A. No sir. [180]

Q. Could you describe a little more in detail how the wheel was broken through? Was it through the center or how?

Mr. Anderson: I think that is improper cross examination and we object on that ground. I will say that we have a witness as to this matter.

The Court: Overruled.

A. At the time the wheel broke as I say, I examined the broken wheel, but how many pieces it was broken in I am unable to say.

Q. Was it broken in several pieces, and was it broken entirely off the axle?

A. The web of the wheel was intact on the axle and the rim was gone.

Q. Do you know how far the car moved from the

(Testimony of Robert J. Lewis.)

time the wheel broke, up to the time the wreck occurred?

A. If the wheel broke and caused the wreck I would not be able to state how far the cars would move before they derailed.

Q. Had you been—withdraw that—Do you happen to know Mr. Lewis, how far back of the point the car actually derailed that any broken portions of the wheel were, I am asking if you know at what point back of the point of the accident it was that the wheel broke?

A. No sir, I cannot tell that.

Q. Then from your own personal knowledge you would not be able to state whether the wreck caused the broken wheel [181] or the broken wheel caused the wreck.

Mr. Thompson: We have no fear of this matter whatever, but it has gone entirely beyond the direct examination. We have witnesses who are experts here to testify as to these matters and I leave it to Your Honor upon the sole ground that it exceeds the bounds of direct examination and is not proper cross.

The Court: He may answer if he knows.

A. No sir, I don't know.

Mr. Bowen: That's all.

Redirect Examination

By Mr. Anderson:

Q. Counsel insisted upon your answering a ques-

(Testimony of Robert J. Lewis.)

tion concerning spread track. Do you understand what he meant?

A. I presume that he meant did a spread track cause the wreck.

Q. What is a spread track?

A. Where the gauge of the track was wider than the traction of the wheels. In this instance it was not or the engine would not have gone over.

Q. The engine remained on the track?

A. The engine and four cars. If the track was spread they would not have gone over.

Q. What is the comparison between the engine and a car as far as weight is concerned?

A. An engine of that type weighs in the neighborhood of [182] two hundred and some odd tons, and the weight of a baggage car and a standard pullman is ninety or a hundred tons.

Q. The part of the wheel that you inspected, was that on the axle?

A. Yes, that part on the axle.

Q. The plate of the wheel?

A. Yes sir.

Mr. Anderson: That is all.

Recross Examination

By Mr. Bowen:

Q. After you got back to the wreck were any of the rails broken?

A. The rails were badly twisted.

Q. Do you know whether they were broken?

A. I don't know. I didn't inspect them.

(Testimony of Robert J. Lewis.)

Q. They may or may not have been broken.

A. They may or may not, I wouldn't say as to that.

Mr. Bowen: That is all.

Mr. Anderson: Yes, that is all Mr. Lewis.

The Court: We will recess for ten minutes.

ALBERT GARDNER

being called as a witness on behalf of the defendant,
after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Anderson: [183]

Q. State your name please?

A. Albert Gardner.

Q. Where do you reside Mr. Gardner?

A. Platteville, Colorado.

Q. What is your occupation?

A. Section Foreman.

Q. For whom are you a section foreman.

A. The Union Pacific Railroad Company.

Q. For how long have you been a section foreman.
A. 29 years.

Q. Were you at Platteville on January 14, 1940?

A. Yes sir.

Q. What portion of the track are you foreman of?

A. From Mile post 32 to 41½ known as the Northern district including Houston, Platteville and Gilcrest.

(Testimony of Albert Gardner.)

Q. How long have you been on that section?

A. The past six years.

Q. That includes Houston, Colorado?

A. Yes sir.

Q. Did you state how long you have been a section foreman? A. Yes sir, for 29 years.

Q. Do you have a gang of men working under your jurisdiction?

A. Yes sir we have an allowance, and the men vary, the number varies in the winter and summer.

Q. State your duties as Section foreman, what do you do?

A. The section foreman with a gang has a territory known [184] as his section and it is his duty to care for and maintain that mileage of track and to keep it in a condition safe for the normal speed of that territory.

Q. Do you recall a derailment at Houston January 14, 1940? A. Yes sir.

Q. Did that occur on Sunday?

A. Yes sir, on Sunday.

Q. Are you on duty on Sunday?

A. No sir, not on duty, but subject to call.

Q. Did you go to the derailment after you found out it had occurred? A. Yes sir.

Q. What did you do after you got there? Did you inspect the track? A. Yes sir.

Mr. Bowen: Objected to as leading.

The Court: It was leading.

Q. State what you did.

A. To make it clear, I have two daughters and

(Testimony of Albert Gardner.)

it is 90 feet from the center of the track to United States highway 85, my daughters were driving and they let me out at the point where we saw the train, the engine and part of the train up the track and the other off the track. I came up the track the way the train came looking for defects that might have caused the wreck.

Q. Was that west of Houston? [185]

A. Yes sir.

Q. How far,—first did you walk along the track, did you say that Mr. Gardner? A. Yes.

Q. How far did you walk along the track before you got to the east end,—the east switch of the Houston siding?

A. That is where I parked the car. I pulled in at the switch and had to walk about ten steps or so and I was on the track west of the wreck.

Q. Did you inspect the track west of the east frog and switch? A. Yes sir.

Q. Did you find any evidence of anything about the track that indicated anything had been dragging?

Mr. Bowen: Objected to as leading.

The Court: It might be suggestive of an answer. Sustained.

Q. Did you inspect the track west of the point of the east Frog? A. Yes sir.

Q. What did you find? A. Nothing.

Q. What area did you cover by the inspection and what did you find?

(Testimony of Albert Gardner.)

A. I covered a space of about five hundred feet to see if I could find any nicks on the rails, to see if there was something dragging or some defect that caused this wreck [186]

Q. Where did you find any nick on the rail?

A. Near the center of the switch about 19 or 20 feet from the frog.

Q. East or west frog? A. East.

Q. Toward Denver? A. Yes sir.

Q. What was the nature of this mark?

A. It was a flat place about one-half inch, like something had been pounded into the top of the ball of the rail.

Q. What is the ball of the rail?

A. That is where the wheel runs on the rail.

Q. What did you find *that* other than that?

A. Nothing west of that, but east sixteen feet or so further was where the rail had began to break away and was torn out from there on.

Q. How many rails broken out?

A. I cannot state how many positively but around three hundred feet.

Q. Do you know what caused the rail to break?

A. Apparently it was the broken wheel.

Q. Had you been over that portion of the track the day before?

Mr. Bowen: Objected to as leading, the question is suggestive and self serving.

The Court: That would be leading you say Mr. Bowen. I don't think so. Overruled. [187]

A. Yes sir.

(Testimony of Albert Gardner.)

Q. What did you do about the track at this point?

A. We have a line of work that requires us to inspect the track. That is, there is a line of work that is required of us. Once a week we must inspect all switches. That is required of us. At this time on Saturday I inspected this switch. That inspection consists of trying the switch, testing the gauge, the frog, center ordinance and switch points.

Q. What was the condition of that track at that time? A. Perfect condition.

Q. What kind of road bed is there at that point. Will you explain it?

A. It consists of Sherman gravel from eight inches to better than eight inches under the ties, they are good treated ties, tie plates and 110 pound rail 39 foot sections laid in 1932.

Mr. Anderson: You may cross examine.

Cross Examination

By Mr. Bowen:

Q. You said that was 110 pound rail?

A. Yes sir.

Q. How much heavier rail is in use on different portions of the Union Pacific Railroad.

A. 131 pound is the heaviest.

Q. That was not the heaviest rail. [188]

A. No sir.

Q. Do you know how old it was?

A. It was rolled in 1931—7/1931.

Q. Made or laid at that time.

(Testimony of Albert Gardner.)

A. Made at that time.

Q. Mr. Gardner, how often do the rules require that you inspect the tracks and switches?

A. Once a week.

Q. Do you have any particular time that you do that work? A. Not as a set rule.

Q. You say not as a set rule?

A. No sir, not as a rule, that is a set rule.

Q. When did you inspect this switch and points prior to the 13th of January?

A. Prior,—it would be on the following close of the week,—no, I don't mean the following, I mean the prior week instead of the following.

Q. Did you keep a record in any book of the time you inspected this switch point?

A. Yes sir and required to make a report every Saturday of what switches were inspected and what was done to them.

Q. How long was it that you had done any work at the point of this wreck?

A. There was no work done there for over thirty days, only cleaning the snow. [189]

Q. No work done for thirty days?

A. Only cleaning snow out of the switch.

Q. Of course, if those inspections are not made by you, what happens to you and your job?

A. I don't have any job left.

Q. You used the word derailment, is there any difference between a derailment and a wreck?

A. Yes.

Q. There is a difference. A. Yes.

(Testimony of Albert Gardner.)

Q. Which was this, a derailment or wreck.

A. A derailment.

Q. And what is a wreck?

A. Well, two cars can come together and not have a derailment but still there would be a wreck.

Q. Do you know how many cars were off the track? A. Four.

Q. Did you observe the position of the pullman car at the scene of the wreck? A. Yes sir.

Q. Can you describe its location?

A. Yes, it was between the last car and the car ahead of it. The third car back.

Q. Which side of the track was it off.

A. The south side. [190]

Q. And in the direction in which the train was running, on which side would that be, the right or the left? A. The right hand side.

Q. How was it laying with respect to being parallel with the track or otherwise?

A. The south end or the end next to the train, next to the engine was next to the track, it was nearer to the track than the other end.

Q. Was one end higher than the other end?

A. Yes sir, slightly and tilted toward the track.

Q. It was not tilted away from the track?

A. As my memory serves me it was toward the track.

Q. Did you look inside of the pullman car?

A. No sir, I didn't look inside of the pullman.

Q. All of your inspection was made after this wreck occurred.

(Testimony of Albert Gardner.)

A. No sir, the inspection was before,—you mean the inspection of the wreck.

A. And the track you spoke about.

A. I wasn't there that morning before the wreck, so it was after the wreck on that date, after I got there.

Q. What time Saturday did you make the inspection of the track?

A. Between eleven and twelve o'clock.

Q. In the forenoon? A. Yes sir.

Q. As to what may have occurred to the track between that [191] time and the time the wreck occurred you wouldn't know?

A. No sir, I wouldn't.

Q. As to the condition the track was in as to being a tight or wide gauge you wouldn't know that,—at the time the wreck occurred?

A. No, I wouldn't know.

Q. I believe you stated that about three hundred feet of the rails was broken out at the scene of the wreck? A. From the switch point east.

Q. Did you examine the rails that were broken out? A. Yes sir.

Q. As to what the gauge was on the engine that was on the train as to whether that was tight or wide you do not propose to testify?

A. No sir, I do not know that.

Q. As to anything about the age of this wheel that you testified to as being broken, or anything about the wheel, you don't know.

A. No sir.

(Testimony of Albert Gardner.)

Q. Did you look at the wheel?

A. I saw the wheel, yes sir. They brought the parts of the wheel and put them on the push car that I have to handle material on, but I had nothing to do with that. It was in the mechanical department.

Q. Do you know how many pieces the wheel was broken in? [192]

A. No sir, I cannot testify as to the amount of pieces.

Q. Your inspection, you say you went back five hundred feet beyond the scene of the wreck?

A. Yes sir.

Q. You didn't go back further than that?

A. No sir, not on that date.

Mr. Bowen: That is all.

Redirect Examination

By Mr. Anderson:

Q. Where is the frog with reference to mark on top of the rail. How far is the frog from where the marks were on top of the rail?

A. Nineteen feet as I remember.

Q. Was there any damage to the frog?

A. None whatever to the frog. That frog is still in service without any work on it.

Q. State whether you saw any train pass over this portion of the track after you made the inspection on Saturday.

A. Yes sir, the regular scheduled trains all the way up to the time this train was derailed went

(Testimony of Albert Gardner.)

over that.

Q. State whether or not these rails are spiked to the ties?

A. Yes sir, it sets on a straight track there, the track and the switches with two spikes to each tie on each side.

Q. Was that done in this instance.

A. Yes sir, *ever* tie had spikes.

Q. Was this straight track or curves? [193]

A. Straight track.

Q. What have you to say with reference to the gauge of that track generally, and at the point of derailment?

A. It was a perfect gauge.

Mr. Anderson: That is all.

Recross Examination

By Mr. Bowen.

Q. What was the condition of the weather at the time and immediately before the wreck?

A. It was cold. I should judge eight or ten above zero.

Q. Was it freezing?

A. Yes sir, below freezing when this occurred.

Q. Have you had any experience as a Section foreman with broken rails caused from cold weather, either too tight or too loose?

A. We don't have broken rails such as we do in bolts and joints.

Q. Have you had broken rails or joints?

A. Not in this class of rails.

Q. Never heard of one?

(Testimony of Albert Gardner.)

A. Yes, I have heard of them but I never had any.

Q. When rails break from cold weather how long does that take? Assuming that the weather is cold enough to freeze and the rail does break, does it break right now, suddenly?

Mr. Anderson: Objected to as not proper recross [194] and it assumes that they do break. This witness has not said that they do.

The Court: I don't think he went into this,—well, I believe he may answer.

A. When they do break it is quick.

Mr. Bowen: That is all.

Mr. Anderson: That is all.

The Court: We will recess at this time until 2 o'clock.

2 o'clock P. M. Oct. 21, 1941.

Mr. Bowen: The plaintiff, at this time, moves that all the testimony of Mr. Gardner the witness who testifies with reference to the broken car wheel and the broken rails as being possible explanations for the wreck of this train be stricken on the ground that it constitutes and is an affirmative defense of the defendant and no affirmative defense is plead. There is no affirmative defense in the answer of the defendant. We think this comes within sub-division C of rule 8 of the rules of this Court. We had no means of meeting this defense of a broken wheel or

rail as a possible explanation of this train wreck. It is affirmative matter and constitutes an affirmative defense and as I say no affirmative defense has been plead, and according to the rule I cited it must be set out affirmatively. We had no way of preparing for the defense of a broken wheel. [195] As to whether they were negligent in permitting that wheel to go upon the rails in this manner we had no advice of what the defense would be.

Mr. Thompson: The defendant was charged with negligence in failing to carry the plaintiffs safely as passengers. That was denied and the issue was thereby made. The issue was properly joined on the question of negligence as I think, notwithstanding the rule, I think the rule relates to those things which one pleads in confession and avoidance and such things as the statute of limitations. Having gone to trial and proceeded with the testimony of these witnesses without raising such objection they are estopped under any circumstances to now interpose such an objection.

The Court: I will check this up and you can proceed at this time.

CLIFFORD M. CLINE

being called as a witness on behalf of the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Anderson:

Q. State your name please.

(Testimony of Clifford M. Cline.)

A. Clifford M. Cline.

Q. What is your profession? [196]

A. Surgeon.

Q. Where do you reside?

A. Idaho Falls, Idaho.

Q. How long have you resided there?

A. Since 1912.

Q. What college are you a graduate of?

A. Northwestern.

Q. Graduated as a physician and surgeon?

A. Yes sir.

Q. Are you licensed to practice in Idaho as a physician and surgeon? A. I am.

Q. Are you engaged in the General practice at Idaho Falls? A. Yes sir.

Q. And have been since 1921? A. Yes sir.

Q. In your general practice does that,—state whether or not that includes the taking of X rays?

A. The reading of X rays.

Q. The reading of them? A. Yes sir.

Q. Did you sometime in July make an examination of A. G. Stanger? A. I did.

Q. Can you tell me when that was, and what your examination consisted of?

A. May I refer to my notes? [197]

Q. You may refer to them, yes.

Q. The examination was made on July 31, 1940.

Q. What does your examination notes disclose?

A. That it consisted of a thorough physical examination plus X ray pictures. X ray pictures of the spine.

(Testimony of Clifford M. Cline.)

Q. Did you in addition to the X ray pictures make some examination of his back?

A. Yes, a complete physical examination.

Q. What did you do with reference to your examination concerning his back, except the X rays?

A. A physical examination.

Q. What did you have him do, if anything?

A. I made a thorough examination to determine about pain and curvature or what have you.

Q. What did you have him do?

A. To go through various motions of the spine.

Q. I show you Doctor, what has been marked for identification as exhibits 4, 5 and 6. Are those X rays which were taken of Mr. Stanger's back?

A. They are.

Q. Did you take them?

A. My X ray technician took them.

Q. Do you know that they are X ray pictures of Mr. Stanger?

A. I do.

Q. Taken in the regular course of taking X rays?

A. Yes sir. [198]

Mr. Anderson: We offer defendant's exhibits 4, 5 and 6.

Mr. Bowen: May we ask a question or two in aid of objection?

The Court: You may, yes.

By Mr. Bowen:

Q. Doctor, at whose request did you make this examination and take the X rays?

(Testimony of Clifford M. Cline.)

A. I have forgotten the name of the gentleman, but he was associated with the Union Pacific.

Q. You don't recall who it was?

A. I think the name was Winchell or something like that.

Q. Did you make an examination and did you take these X rays for the purpose of treating Mr. Stanger? A. I did not.

Q. For what reason did you make this examination and take the X rays?

A. At the request of the Union Pacific or of this gentleman from the Union Pacific.

Q. You were not requested by any other person?

A. No, sir, I wasn't.

Mr. Thompson: You know that Mr. Stanger gave us authority to have him physically examined did you not?

Mr. Bowen: I think this examination and the pictures come under this rule of privileged testimony.

Mr. Thompson: I think Your Honor, that we can [199] shorten this up.

The Court: Very well, go ahead.

By Mr. Anderson:

Q. Doctor showing you exhibit "7" is that the authorization under which you proceeded to examine Mr. Stanger? A. As I recall, it is.

Mr. Anderson: We offer in evidence exhibit "7".

(Testimony of Clifford M. Cline.)

By Mr. Bowen:

Q. Did you receive proposed exhibit "7" before you made this examination?

A. There was some certificate of authorization shown me but I didn't have it in my possession.

Q. Is defendant's exhibit "7" the authorization?

A. As I said, I think it is.

Q. Will you say that it is or is not?

A. I believe it is.

Mr. Bowen: May I ask another question on this exhibit now?

The Court: You may do so.

By Mr. Bowen:

Q. At the time you received the proposed exhibit "7" were you in possession of any information or records regarding Mr. Stanger?

A. None whatever.

Q. You had none at the time you received that exhibit? A. No, sir. [200]

Q. This authorization merely gives you the right to give the railroad company any information or copies of information you have?

Mr. Thompson: The exhibit speaks for itself and we object to this question for that reason.

The Court: Sustained.

The Court: Did you receive this after you made the examination?

A. Before, it was handed to me before, although I didn't have it in my possession.

Mr. Thompson: We do not rest our right of ex-

(Testimony of Clifford M. Cline.)

amination entirely on that. That merely was an acknowledgment of willingness that we might make inquiry and examination concerning his physical condition. The record shows that he voluntarily appeared before the physician of our selection and the Doctor says here that it was not for the purpose of treating him or prescribing for him. So there is no reason why the Doctor should not testify here.

The Court: What did you understand as to the circumstances that Mr. Stanger came to you for examination. Did he employ you?

A. At no time.

The Court: What did you understand.

A. I understood from this gentleman that brought this exhibit, that Mr. Stanger was coming for examination. [201] Mr. Stanger phoned for an appointment and I made it and examined him for a report for the Railroad Company.

The Court: What did Mr. Stanger say to you?

A. He said that he had been requested by the Railroad Company to come for an examination by me.

The Court: He came and you examined him?

A. Yes, sir.

The Court: This is a voluntary appearance. It is not the position of physician and patient. It comes under that rule where one comes and submits to an examination by the adverse party. He didn't come as a patient. He knew this man. It was the same as if they had come before the Court for

(Testimony of Clifford M. Cline.)

an order to have the examination, but he appeared voluntarily.

Mr. Bowen: My point was this. This authorization gave the Doctor permission to give the railroad any information he had.

The Court: Counsel says that he doesn't rely on this entirely, but that there was a voluntary appearance for examination and he relies on both.

Mr. Bowen: I will withdraw our objection. I think perhaps it takes it out of the rule.

As to the X rays we object to the introduction upon the ground that no sufficient or proper foundation is laid. The question was asked if they were made in the usual course of business. I think no proper found- [202] ation is laid.

The Court: I think you have to go further than that. The objection is well taken at this time.

By Mr. Anderson:

Q. Explain how these X rays were taken.

A. We have an X ray department in our office. The person is taken into this room and prepared for the picture. It is then taken to the X ray technician and developed by her and examined by me afterward.

Q. Do you know they are pictures of the person who went into the X ray room? A. Yes sir.

Q. Do you supervise the taking of the X rays?

A. Not the technique but I examine the pictures.

Q. Is that the ordinary manner of taking X rays? A. Yes sir.

(Testimony of Clifford M. Cline.)

Q. Do you say those are X rays taken of Mr. Stanger? A. Yes sir.

Q. Mr. Anderson: We now renew the offer of exhibits 4, 5, and 6, which are X rays taken of Mr. Stanger.

The Court: The objection is overruled, they may be admitted. Number 7 is also admitted.

Q. Now, Doctor, referring to exhibits 4, 5 and 6 which are X rays of Mr. Stanger, which you took. What part of the back do these X rays cover?

A. They cover the cervical and thoracic vertebra.
[203]

Q. Near the bottom of the shoulder blade?

A. Yes sir.

Q. From these X rays do you find anything wrong with Mr. Stanger's back?

Mr. Bowen: Objected to as leading and suggestive, and calling for a conclusion of the witness.

The Court: Sustained.

Q. What do these X rays show concerning Mr. Stanger's back and spine?

A. The X ray pictures reveal no lesion or damage to the spine.

Q. Do they show any other injuries of any kind?

A. In my report, and I have looked at the pictures again, I find they are essentially negative.

Q. What do you mean by that?

A. I think they are negative.

Q. That they show nothing wrong?

A. That's right.

(Testimony of Clifford M. Cline.)

Q. You mean, Doctor, from the terms used, that essentially they fail to show anything wrong?

A. That's what I mean, yes.

Q. You did make an examination other than taking of the X rays, did you not?

A. Yes sir.

Q. As a net result of your entire examination what did you find concerning Mr. Stanger's back, as to whether it was injured or not? [204]

A. May I look at the report?

The Court: Report that you made at that time?

A. Yes sir.

The Court: Certainly.

A. Mr. Stanger complained of pain which has been persistent since the derailment on January 14, will get relief by going to chiropractor or using hot pad, or electric pad. Height 6 feet 1 inch, weight 180 pounds, eyes negative, upper plate, tonsils slightly embedded; throat negative; heart negative lungs negative, complaint, pain in back. No limitation of motion; abdomen, right scar appendectomy. No evidence of spinal curvature, spine essentially negative.

Q. Had his tonsils been removed?

A. No, they were slightly embedded.

Q. Did you discover any objective symptoms of injury?

A. No objective symptoms.

(Testimony of Clifford M. Cline.)

Q. What is the difference between subjective and objective symptoms?

A. Subjective symptoms, rather subjective is what the patient states, and objective are symptoms the physician finds.

Mr. Anderson: That's all, you may examine.

Cross Examination

By Mr. Bowen.

Q. Doctor, directing your attention to exhibit 4, you would say that is not a very good X ray would you not? [205]

A. I would say it is a very good picture. All those are.

Q. How much of the dorsal region of the spine does that show?

A. The segment below where that other is taken.

Q. How much of the dorsal does exhibit "4" show?

A. It is down to the 12th rib, to the bottom of the dorsal vertebra.

Q. From that exhibit "4" that doesn't disclose any abnormality or condition that may cause pain?

A. I can tell the Court my opinion of the pictures as a whole is that they are good, but any anterior posterior picture through the region of the heart never shows up clearly if you are shooting through the chest and ribs, then that picture is indistinct.

Q. And exhibit "4" is indistinct.

(Testimony of Clifford M. Cline.)

A. The dorsal is not distinct in this picture.

Q. Then Doctor, as to the condition the dorsal vertebra are in, if they do not appear you would be unable to say what the condition was?

A. Except from the lateral picture.

Q. Were you in the room when these were taken?

A. I wouldn't want to say that I was in the room. I may have been or may not have been. I don't stay all the time these pictures are taken.

Q. And you didn't find any objective symptoms. That is, in the examination you made?

A. No sir. [206]

Q. Did you find any subjective symptoms.

A. I found Mr. Stanger said to me that he had pain which was more or less persistent, and also a dull aching which was more or less continuous, and complained of tenderness and complained of pain around the dorsal vertebra.

Q. How many dorsal vertebra are there?

A. Twelve.

Q. And the cervical, how many are there?

A. Seven.

Q. How many of the cervical is shown in exhibit "4"? A. None in this picture.

Q. Did you actually feel Mr. Stanger's spine with your hand? A. I did.

Q. Did you elicit pain when you examined it?

A. He complained of tenderness there and soreness.

(Testimony of Clifford M. Cline.)

Q. You have to co-relate the two, the objective and the subjective symptoms. The X rays do not show pain?

A. No sir, but they do show the cause of pain.

Q. Do they always show the cause of pain?

A. Not necessarily.

Q. Isn't it true, Doctor, that you find pain and severe pain, and yet so far as your ability to feel that with your fingers or show it with an X ray, that would be impossible?

Mr. Anderson: Objected to on the ground that what are subjective and objective symptoms are defined, [207] and now he asks if a man, according to his experience, cannot have a painful condition or have pain which is not discernible objectively. That cannot be answered since he is not able to fathom the subjective symptoms. This witness says that he could not discover any pain or cause for pain.

The Court: He may answer.

A. I don't understand the question.

Q. The Court: You may reframe the question.

Q. Doctor, is it, in your opinion, as a professional man, possible for a patient to have a severe pain in the spine, the dorsal region of the spine, and you would be unable to see it, or discover it by feeling with your hands or by taking an X ray?

A. I think a person could have pain and be in the hands of any expert and it might be overlooked. I am inclined to believe with the experience that I

(Testimony of Clifford M. Cline.)

have had I am able generally to determine whether they have pain or not.

Q. May a patient have a pain, and a severe pain in the dorsal region, there being no objective symptoms?

Mr. Thompson: Objected on the ground that it involves the assumption that the Doctor knows that the person did have a pain.

The Court: The Doctor can explain his answer.

Q. Doctor Cline, may a patient have a pain, a severe pain [208] in the dorsal region and there be no objective symptoms?

Mr. Thompson: Objected to on the grounds last assigned.

The Court: He may answer and explain his answer.

A. I think it might be possible for a patient to have pain, yes, to actually have pain and the physician and surgeon may overlook it.

Q. Directing your attention to exhibit "5".

A. That is a lateral picture of the dorsal spine.

Q. When you say lateral, what do you mean?

A. From side to side.

Q. Do you know how he was lying at the time that was taken? A. Yes.

Q. How? A. On his side.

Q. Does that show the normal spine?

A. This picture shows a normal spine.

Q. Would you say it is a clear picture?

(Testimony of Clifford M. Cline.)

A. I would say it is a splendid picture for a lateral picture.

Q. Does it show a curvature?

A. No curvature at all, just as you get in a lateral picture.

Q. Now, as to exhibit "6" what do you say as to defendant's exhibit "6" show the dorsal vertebra?

A. This is a picture of the cervical and the thoracic or dorsal. The cervical is clear, very clear, and the [209] thoracic is as you always have it in these pictures.

Q. The dorsal is indistinct.

A. Just as they were in exhibit "4" as I explained the heart and ribs cover the picture in an anterior-posterior.

Q. And in exhibit "4" and exhibit "6" the dorsal vertebra are indistinct?

A. Yes sir.

Q. That is the region where Mr. Stanger complained of pain? A. Yes sir.

Q. Now, Doctor, isn't it true that while Mr. Stanger was at your office on the occasion you made this examination that you prescribed to him that he be put in a cast?

Mr. Thompson: I object to this on the ground that it appears that the only purpose for which this may submitted himself to the witness was for the purpose of a physical examination and not for the purpose of prescribing or treating the patient.

(Testimony of Clifford M. Cline.)

He has not been asked concerning any such matter on direct examination.

The Court: Would not that have some bearing on the condition of the plaintiff? Overruled.

Mr. Thompson: If Your Honor thinks it would have some bearing, I will withdraw the objection.

A. I might add that Mr. Stanger came back to my office at least twice, asking if I had some advice and he made the statement; "would a cast help me" and I said: "Sometimes a cast does help these backs." [210]

Q. Just answer my question, if at the time Mr. Stanger came and had the X rays made, exhibits 4, 5 and 6, you then made your examination, and at that time you and Mr. Stanger being present that you didn't say to Mr. Stanger and suggest to him that a plaster paris cast be applied to him?

A. I remember making no such statement.

Q. Would you say that you don't recall it, or that you didn't make it?

A. I didn't make it, I don't recall making it.

Q. But you may have made such a statement.

A. I question it very much.

A. If you made such a suggestion that of course, it was in your opinion necessary.

A. If I made such a statement after this examination, I considered if he took a complete rest he would get over his trouble.

Q. If you made such a statement on the take that you took the X rays that he be put in a cast

(Testimony of Clifford M. Cline.)

in the dorsal region, if you made that statement, you thought it was necessary.

A. It would be to give Mr. Stanger a rest.

Q. Will you answer the question?

A. I don't think I said it, and in the second place, you asked this question, if I said to put on a cast that I must have had a reason——

Q. I asked, Doctor, if you said it, then it was necessary in [211] your opinion?

A. Yes sir.

Q. Doctor, so that we might have the record clear, were you paid for making the examination?

A. Yes sir.

Q. And for taking the X rays?

A. I was, yes.

Q. Who paid you?

A. The Union Pacific Railroad Company.

Mr. Bowen: That is all.

Redirect Examination

By Mr. Anderson.

Q. State whether or not you are still of the opinion that these X rays are essentially negative?

A. I am.

Q. From the findings you made after making the examination will you state whether or not you are of the opinion that you made any such suggestion that he should be put in a cast?

A. I don't recall any such suggestion. I think it was made to me and not to the patient. Going

(Testimony of Clifford M. Cline.)

back eighteen months, I don't just recall.

Mr. Anderson: That is all, Doctor.

Mr. Bowen: That is all. [212]

DOCTOR HOYT B. WOOLEY

Being called as a witness on behalf of the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Thompson:

Q. State your name, age, place of residence.

A. Hoyt B. Wooley, age 38, Idaho Falls, Idaho.

Q. Occupation.

A. Physician and surgeon.

Q. Are you admitted to practice medicine in Idaho?

A. Yes sir, I am.

Q. How long have you been so admitted?

A. About eight years.

Q. I wish you would state to the Court, your preparation and study and qualification prior to your being admitted, or at any time, to practice medicine.

A. I graduated from high school in 1920——

Q. —It is sufficient to begin with your medical school.

A. Graduated from Northwestern in 1933.

Q. With what degree?

(Testimony of Dr. Hoyt B. Wooley.)

A. A degree of M. D. I took fifteen months internship, twelve months in the Illinois Masonic Hospital from January 1932 to December,—it was the last of December 1933 and then three months in the L. D. S. hospital as resident physician at Idaho Falls prior to taking the [213] Idaho State Board, which I took in April and started to practice in May of 1934.

Q. Do you know Mrs. Stanger, one of the plaintiffs in this case? A. Yes sir.

Q. And what have been your contacts with Mrs. Stanger, from a professional point of view.

A. May I refer to my record?

Q. Yes, you may do that.

A. The first professional service that I rendered was on the 10th of November 1939. Now, do you wish me to state the circumstances under which it was given?

Q. Yes, and the history and all you have.

Mr. Bowen: Just a moment, may I ask the Doctor a question?

The Court: For the purpose of making an objection.

Mr. Bowen: Yes, Your Honor.

The Court: You may do so.

By Mr. Bowen:

Q. Mrs. Stanger came to you to be treated?

A. Yes sir.

Q. Did you treat her? A. Yes sir.

(Testimony of Dr. Hoyt B. Wooley.)

Q. Did she pay you? [214]

A. Yes sir.

Q. What is the first time you told the Union Pacific Railroad Company about this treatment?

A. I think I will have to refer to,—well, to the best of my knowledge that would be the 9th of August 1941.

Q. That was the first time that you told anyone connected with the Union Pacific Railroad Company, the defendants in this action, that you had treated Mrs. Stanger.

A. To the best of my knowledge.

Q. Do you think, Doctor, that it might be before that time?

A. I don't recall of any such conversation before that time.

A. Mr. Bowen: Now, Your Honor, we object to this evidence, it is privileged communication, and comes within the rule. A Railroad Doctor who treats a patient in 1941 tells the Railroad Company all about it and now wants to tell this Court about it.

Mr. Thompson: The Court will remember that Mrs. Stanger says that she has no objection to this Doctor testifying.

Witness: May I say something,—

The Court: Yes.

Witness: I was shown permission,—a slip giving me permission to testify, which was signed by Mr. Stanger, giving me permission to give this information to the Railroad Company.

(Testimony of Dr. Hoyt B. Wooley.)

Q. When was that? [215]

A. At the time as I gave you, August 9, as I recall it.

Q. Which slip was it you saw?

A. The only way I can answer was that it was a slip of paper authorizing me to give any information that I had to the person bearing that slip.

Q. Now, as to Mrs. Stanger, did she sign that slip of paper? A. No sir, she didn't.

Q. You know that she didn't sign it or send it to you. A. No she didn't sign it.

Q. You never got any authorization from Mrs. Stanger?

Mr. Thompson: I submit that this does not go to their objection.

The Court: The witness volunteered the information that permission was granted to him to give this information to the Company. He may answer.

A. I don't recall the exact wording of the slip of paper but to the best of my knowledge the substance was this: "To whom it may concern, this authorizes that you may give what information you have concerning Mrs. Stanger or myself."

The Court: Who signed that?

A. Signed by Mr. Stanger, the slip that I saw.

Q. Signed by Mr. Stanger?

A. That's right.

Mr. Bowen: I think that would come under [216] the same rule. Now, as to whether he can sign for Mrs. Stanger——

(Testimony of Dr. Hoyt B. Wooley.)

The Court: —He cannot.

The Court: Now, go ahead.

Mr. Thompson: But she waives as to this Doctor she has waived any privilege.

Mr. Bowen: I think that is correct.

The Court: Then there is no dispute that she says she would let this Doctor testify.

Mr. Bowen: Mrs. Stanger says that.

The Court: That seems to settle this. Now go ahead.

By Mr. Thompson:

Q. The history that was given by her to you, and all that followed, up to the time of your examination and prescribing medical care, at the conclusion of that, and following up to the time that you last saw her prior to this derailment.

A. On that date,—on the 10th of November 1939 my records show a history given me by Mrs. Stanger that she, for the past four years had been flowing from eight to ten days twice a month.

Q. Twice a month?

A. Yes sir,—that large clots, back ache, cramps in the groin before menses and during menses; fatigues easily; run down most of the time, and had been taking iron pre- [217] paration. The last menstrual period was October 28 to November 9th, and she said that the last five days was much darker than usual. The blood count at that time showed 42 per cent hemoglobin, and the course of treatment

(Testimony of Dr. Hoyt B. Wooley.)

instituted was an intermuscular injection of astrone 2 thousand units three times weekly. I also made up a preparation,—do you wish me to state?

Q. Yes.

A. Elixir of Ferrin oz. 4. Jecolein q s a d oz. 16 and the directions on such prescription was a desert spoon full three times daily, one half hour before meals.

Q. When did you last see her prior to January 1, 1940? A. January 1, 1940, you say.

Q. Yes, when was she last to your place of your office of you to her home?

A. The last time prior to that time was the 14th day of December 1939.

Q. Had you dismissed her as a patient?

A. That wasn't my understanding, no sir.

Q. What was your understanding at that time?

A. At that time Mrs. Stanger told me that she and her husband were leaving on a trip, and that when she returned she would be back.

Q. Did she ever come back? A. No sir.

Q. Did you at any time tell her that her condition had all [218] cleared up or had all cleared up in December 1939, or at any other time?

Mr. Bowen: Is this an impeaching question?

Mr. Thompson: No, she said that Doctor Wooley had treated her and we are asking about the treatment.

Mr. Bowen: We object to the question as no sufficient foundation is laid.

(Testimony of Dr. Hoyt B. Wooley.)

The Court: He may answer.

Q. No sir I don't recall making that statement.

Q. Do you say that you did or did not?

A. I would say that I didn't.

Q. You did not make such a statement to her.

A. I did not.

Q. What is the fact as to whether her condition had cleared up, and that she did not need further treatment, surgical or medical?

A. As I understand your question, if I had told her,—had made that statement to her I would be implying that the condition was cured. I don't think so, I didn't think so at any time.

Q. Have you examined the hospital chart and the record of her operation and the report of the analysis,—the pathological report made upon portions that were amputated?

A. No sir, I haven't.

Mr. Thompson: May we have that exhibit?

The Court: Mr. Bailiff, give counsel the exhibit.

[219]

Q. I show you defendant's exhibit "1" which is a hospital record of Mrs. Stanger, which covers the operation she had in July 1940, and the record preceding that, and I will ask you to examine it and express your opinion concerning her condition in December,—that is, say whether in your opinion her condition was cleared up and if not, what your opinion is.

(Testimony of Dr. Hoyt B. Wooley.)

Mr. Bowen: To which we object upon the ground that it is deciding, or rather asking the very question Your Honor has to decide, and on the ground that Mr. Thompson objected to our question of Doctor Lynn. It is the very question this Court is to decide in this suit.

The Court: He can testify as to his own treatment of the patient, but when he asks him to take the opinion of other people, but now, I think he is asking about this time that this Doctor was treating the patient and knows from his own knowledge, then of course, he can give that opinion. I think the way this question is framed that we are getting into deep water. I believe I will sustain the objection, as I read these decisions they are so broad that they hold that an expert witness cannot give an opinion upon a question assuming a state of facts which includes the examination or report of other physicians or other people.

Mr. Thompson: Does it deal with diseased parts [220] as this question does?

The Court: I think this question comes under the rule laid down. Objection sustained.

Mr. Thompson: May I save an exception?

The Court: Yes.

The Court: Did you make any findings, Doctor, in December 1939?

A. No, I didn't examine her, not on the 14th of December 1939.

(Testimony of Dr. Hoyt B. Wooley.)

Q. From the history she gave and out of that pathological report which is based upon definite material.

The Court: Now, he did make some findings, I understand, at least, up to that time, he had made an examination and treated her up to that time, to December.

Q. I will limit to the portion of the hospital record consisting of the pathological report.

Mr. Witty: But that is the report made by another.

A. May I say this, the pathological report may be interpreted by any physician. It is simply a pathological report and does not involve someone's opinion other than the pathologists opinion of the diseased parts. I imagine Mr. Thompson wishes to connect the pathological report with my findings when I examined her.

The Court: Yes, maybe that would not come [221] under the rule. He is basing his answer upon that report and comparing is as to his findings. He is not giving an opinion on the report of their opinion, he is now interpreting the pathological report and comparing it with his, and then giving us the result.

Q. I want your opinion based upon the history you had and your examination and treatment of Mrs. Stanger up to the time you last saw her in December, based upon that, plus the pathological report you had.

(Testimony of Dr. Hoyt B. Wooley.)

Mr. Bowen: To the extent that it is based upon the pathological report we object upon the ground that the exhibit is in evidence, a part of which can be deciphered, and this invades the province of the Court and seeks to decide the question this Court must decide.

Mr. Thompson: The opinion I seek is whether her condition was cleared up on December 14, 1939, or what her condition was at that time, in your opinion.

The Court: Overruled.

A. The interpretation of this pathological report as it fits in with my findings at the time of the examination of Mrs. Stanger.

Mr. Witty: Did you make any findings on December 14, 1939?

Mr. Thompson: We object to two counsel examining a witness. [222]

The Court: Yes, we have a rule on that. I think, too, that he said he didn't make any findings on that date.

A. The pathological diagnosis by Doctor Daines of tissue from the uterus, cervical tissue. Fibrosis uteri with diffuse endometrial hyperplasia. Chronic fibrous cervicitis. Multiple follicular cysts of the ovary with corpus hemorrhagicum. The diagnosis is fibrosis uteri with diffuse endometrial hyperplasia, which could be ascribed to the history Mrs. Stanger gave me at the time of my examination.

(Testimony of Dr. Hoyt B. Wooley.)

Q. Taking the physical facts into account that you have just read from that report and the examination that you made and the history that Mrs. Stanger gave to you I will ask you whether you are of the opinion that Mrs. Stanger was cured of the illness that she came to you with, and described to you. If she was cured of that on December 14, 1939?

Mr. Bowen: Objected to as calling for a conclusion of the witness. I object on the ground and for the further reason that it invades the province of this Court.

The Court: Overruled.

A. I would say she was not cured.

Q. What are the physical ailments, particularly directing your attention to that pathological report, what are [223] the physical ailments of the organs normally or naturally associated with the history she gave you?

A. Excessive menstruation.

Q. That comes from what? What may it come from? May it come from any of those things that you have read?

A. Yes sir.

Q. Explain to the Court the disorder that female organs such as we have been dealing with,—what sort of disorders bring about the condition she had when she came to you?

A. The condition of the uterus which was fibrous was a condition that occurs over a period of time,

(Testimony of Dr. Hoyt B. Wooley.)

and is of a chronic nature. Hyperplasia endometrial is a condition in which the lining of the uterus which normally is sloughed off at each menstruation is much thicker than normal, because of the increase in size and thickness, the increase in vascularity causes the flow to be continued and causes, or because of the replacement of muscle tissue by fibrous tissue does not permit the uterus to contract, thus bringing about a continuation of the flowing.

Q. What are the things that a physician does to correct such a condition or situation of continuous flowing, surgically, that she described to you?

A. When you put the question, surgically, the only thing you can do is remove the uterus. [224]

Q. Then if,—I will *be* this in the inquiry to assure myself. If there is a fibrous uterus such as is described in the pathological report, what are the symptoms or manifestations of it?

A. Excessive flowing.

Q. What are the symptoms or manifestations of cystic ovaries, say multiple cystic ovary.

A. There is no connection between cystic ovary and the excessive flowing.

Q. That would be caused exclusively from the fibrous uterus? A. Yes sir.

Q. Would there be any reason, in surgery, why, operating for fibrous uterus, one should so operate as to interfere with the blood supply to the right ovary and not interfere with the blood supply to the other,—assuming one was affected by multiple

(Testimony of Dr. Hoyt B. Wooley.)

cysts, is there any reason one should, in operating, interfere with the blood supply to the bad ovary and not interfere with the blood supply to the good one?

A. I don't understand the question.

Q. In skilfull surgery,—in normal skilfull surgery on the uterus, for fibrous uterus, ought the operation interfere with or cut off the blood supply to either ovary? A. No sir.

Q. Is there any reason why it should cut off the blood supply to one more than the other, if it cuts off the [225] blood supply at all. If it is skillfully performed? A. I would say no.

Q. Have you stated what chronic fibrous cervicitis is? A. I don't think so.

Q. What is it?

A. Chronic fibrous cervicitis is a condition very similar to the fibrous condition you have in the uterus only it exists in the cervix or the mouth of the uterus, it is a condition of the replacement of normal cervical tissue with fibrous tissue.

Q. What does chronic mean, applied to that?

A. A condition lasting over a period of time.

Q. What do you mean by "over a period of time"?

A. I would say months or possibly a year.

Q. Suppose a patient comes in who has a flowing condition such as Mrs. Stanger described to you and pathological report shows fibrosis uteri and chronic fibrous cervicitis, what is your opinion now, do you say was the cause of that excessive flowing?

(Testimony of Dr. Hoyt B. Wooley.)

A. The fibrous condition of the uterus and hyperplastic condition of the endometrium.

Q. Let us suppose that a person of the history which Mrs. Stanger gave you, but we are not supposing Mrs. Stanger, and such observations as you say you made of Mrs. Stanger and her condition as you saw her on Decem- [226] ber 14, 1939, and let us suppose that person, or such person rides from Idaho Falls to Denver and is seated in a Pullman car, facing forward and there is a derailment, and there is a table such as there are in Pullman cars, fastened into the side of the car between seats, the seats facing forward and backward; that there is a derailment and that person is thrown forward so that a portion of her abdomen corresponding with the table is thrown against the table, but with no rupture or evidence of discoloration or physical injury to the abdomen; that the person is assisted from the car which comes to rest partially upon the grade and partially off, and in a tilted but still in an upright position and such person goes between thirty and forty miles in to Denver,—is assisted to an automobile and rides in an automobile to Denver and there is treated for some abrasion to one of her lower limbs but does not affect her in getting about; that she has lunch with friends; that she goes, in the afternoon, to a horse show; that she then goes to a banquet of some sort; that she then

(Testimony of Dr. Hoyt B. Wooley.)

takes the train for Houston, Texas, spends a couple of days there and goes to Mexico City where she goes sightseeing for a period of four or five days, using an automobile to go about to the various places, she goes from there to Los Angeles and from Los Angeles to Idaho Falls and [227] then goes to her home. Getting back to Idaho Falls at the end of about thirty days, the 29th or 30th of January, she doesn't consult a physician until February 12, but remains at home, and subsequently, with her physician not testifying or stating, or she either,—that she had any treatment in the interim,—she is operated for that which corresponds to that shown in the pathological report. I will ask you whether in your opinion, the condition disclosed by the pathological report was, or a portion was caused by the derailment.

Mr. Bowen: To which we object upon the ground that the question doesn't contain all the facts or a substantial statement of the facts in this case and is misleading as to other facts as stated and upon the further ground that it invades the province of the Court and seeks to decide the very question in controversy here.

Mr. Thompson: The rule requires counsel to call attention to any misstatement or omissions of the facts. If counsel will do that I will gladly include any facts omitted.

Mr. Witty: If that is the rule.

(Testimony of Dr. Hoyt B. Wooley.)

The Court: Then suppose you do that.

Mr. Witty: Counsel failed to state in his question to the witness that immediately following the [228] accident that Mrs. Stanger began to flow excessively and that the condition has persisted from that time on. He failed to state that the plaintiff Mrs. Stanger was in an exceedingly nervous condition; that she was unable to get any sleep from Denver to Houston. It was an overstatement to say that they were in Mexico City four or five days. I don't recall that they went to a banquet in the afternoon of this accident. Those are some of the vital statements of fact occurring in the testimony and not in the question.

Mr. Thompson: They went to the athletic club to dinner. I will modify the question in that.

Mr. Witty: Further he fails to state that the record shows that prior to the trip she had entirely cleared up from flowing and that she considered herself in perfect health and never considered her health better; that she had for three months been in perfect health.

Mr. Thompson: And I supplement the question with the fact that prior to the trip the patient said that she had just completed menstruation, and to balance against that, your personal observation and history and other things embraced in the question, the statement of the witness, I do not assume it to be a fact but that the witness stated that immediately following [229] the derailment she proceed-

(Testimony of Dr. Hoyt B. Wooley.)

ed to menstruate profusely and flowed profusely. I do not think I can assume facts with reference to the extent or the duration of the abnormal menstruation thereafter.

Mr. Bowen: Now we object further to counsel's last statement. He is asking again that this witness decide what this Court has to decide and asking the witness to weigh the evidence.

The Court: Objection sustained.

Mr. Thompson: And I may have an exception?

The Court: Yes.

Q. Doctor, taking a patient such as the one we have been discussing and considering the operation, the nature of which you have a pathological report of—no, I think that is all, you may take the witness.

Cross Examination

By Mr. Bowen:

Q. You didn't tell us whether you are on the staff of the railroad physicians. A. I am.

Q. How long have you been on that staff?

A. Since August 1938.

Q. You were a member of the Union Pacific staff when Mrs. Stanger first came to you?

A. I was.

Q. And still are? [230] A. I am.

Q. Were you subpoenaed down here to testify?

A. I wasn't given a subpoena. I was given a message.

(Testimony of Dr. Hoyt B. Wooley.)

Q. You just came on your own accord.

A. No sir, Doctor Cline gave me a message to be here.

Q. You came at the request of Doctor Cline.

A. Doctor Cline was requested to be here, by, well, I don't know by whom.

Q. You came down at the request of Doctor Cline.

Mr. Thompson: I will say that I requested Doctor Cline to request him to be here.

Q. Who requested you to come to testify?

A. I will have to put it this way, when I was making the rounds of the hospital there was a note there to see Doctor Cline. I did and upon having a conversation with Doctor Cline, which was in effect this, that Mr. Thompson's office had asked him to convey to me the request that I be down here with Doctor Cline, as a witness.

Q. Now, Doctor, I think you stated that the first information you gave the Railroad Company about Mrs. Stanger was in August of this year.

A. I think that is right.

Q. That wasn't in August of last year 1940 was it?

A. No.

The Court: We will take a recess for ten minutes. [231]

(Testimony of Dr. Hoyt B. Wooley.)

4:10 o'clock P.M. October 21, 1941

Q. I think that you stated that you had been practicing for eight years.

A. About eight years.

Q. I think in answer to one of counsel's questions you stated that in all cases where women had fibrous uterus there is excessive flowing.

A. That of course, would depend upon the degree of fibrosis.

Q. Did you take that into consideration when you answered counsel's question?

A. As I understood it, it was in reference to this particular condition. I didn't interpret the question to mean a general condition.

Q. What did you mean.

A. With reference to fibrosis uteri with hyperplasia endometrium, you would have excessive flowing.

Q. In all cases? A. Yes sir.

Q. Now, when did you make any examination, physical examination of Mrs. Stanger, not just by asking questions,—if you did.

A. I did on the 10 of November 1939.

Q. Tell us what you did.

A. I checked Mrs. Stanger as to her physical condition, excluding a pelvic examination. Mrs. Stanger had been [232] flowing from the 28th of October until the day before she came to my office and under the circumstances I would not be,—that

(Testimony of Dr. Hoyt B. Wooley.)

is, I didn't think it would be advisable for me to make a pelvic examination.

A. Did you ever make a pelvic examination of Mrs. Stanger? A. No sir, I did not.

Q. Did you see the portion of the uteri that was removed? A. I did not.

Q. All you know of the uterus being fibrous is what someone else told you?

A. What I read.

Q. From what you read and someone told you is the only basis you had for saying this uterus was fibrous. A. No sir, it is not.

Q. I want to know what else you had.

A. On the history of excessive flowing. It is a history of fibrosis uteri and hyperplastic endometrium.

Q. There is no other cause that causes excessive flowing except fibrous uterus.

A. No sir, that is not correct.

Q. How many other conditions?

A. How many others.

Q. Yes, how many other conditions are there?

A. Incomplete abortion, glandular infection——

Q. Would nervousness, run down and weakened condition [233] cause that.

A. Not to bring about the condition over a period of time as this condition.

Q. I am asking generally, a person who was run down and nervous, a high nervous tension, would it contribute to excessive flowing?

(Testimony of Dr. Hoyt B. Wooley.)

A. It might be a contributing cause, yes.

Q. You said that Mrs. Stanger said that she had been flowing for the past four years from eight to ten days twice a month.

A. Yes sir.

Q. Who was present when she made that statement to you?

A. Who was present.

Q. Yes.

A. Mrs. Stanger and myself.

Q. If Mrs. Stanger had had a child in the interim of that four years would that make any difference in your opinion Doctor.

A. Certainly in that during pregnancy the flow stops.

Q. That would be true of Mrs. Stanger?

A. Yes sir, with anybody that would be true.

Q. You know Mrs. Stanger has a baby about a year old?

A. Yes sir, I did.

Q. And you still think, in view of that, that she told you that for the past four years she had flowed eight to ten [234] days twice a month.

A. Yes, but you would have to interpret that to be during the period that pregnancy was not present.

Q. Did Mrs. Stanger tell you what you said,—tell us what she said as to during the past four years that she flowed from eight to ten days twice a month?

A. That is the information she gave me.

Q. You knew at the time that she had had a baby during that time?

A. Naturally.

(Testimony of Dr. Hoyt B. Wooley.)

Q. Did Mrs. Stanger say that she had flowed excessively or that the period of time over which she flowed was greater than usual.

A. I would have to answer that question this way. That she said that she had large clots which could be significant of excessive flow. Speaking of excessive in relation of normal flow, and that the time element would have reference to prolonged flowing.

Q. Rather than to amount?

A. I think the amount as I have said, is covered by the large clots.

Q. When did you prepare the record you have been refreshing your mind from in Court?

A. It was prepared the day Mrs. Stanger was in the office.

A. You prepared that yourself?

A. Yes sir. [235]

Q. The first time that you say Mrs. Stanger was November 10 1939?

A. Yes sir, in regard to this condition.

Q. The last time that you say her was December 14, 1939?

A. That is right.

Q. How many times did she come to see you during that thirty day period?

A. I don't have my record of the visits that Mrs. Stanger made, with me. It is a matter of record at the office. The only record I have on this card, are two other times the 23rd of November and the 14th

(Testimony of Dr. Hoyt B. Wooley.)

of December, I checked the hemoglobin at those times and so it is on this card as a progress note.

Q. Isn't it a fact that you gave Mrs. Stanger what you call shots? A. That's right.

Q. Didn't they have the desired effect that you intended them to have?

A. Yes sir, I think they had a beneficial effect.

Q. You know they did? A. Yes sir.

Q. She responded to that type of treatment which you gave? A. Yes sir.

Q. Isn't it true when you last saw her that this flowing had entirely cleared up? [236]

A. I think that's right.

Q. Isn't it a fact that Mrs. Stanger told you she was feeling fine and was going away on this trip and that you told her it was all right.

A. I do think she was feeling much better.

Q. And had responded to your treatment?

A. Yes sir.

Q. And wouldn't you expect that to continue had there not been some intervening cause?

A. That question I would base my answer on other experience and other case histories.

Q. She responded as an ordinary woman to the type of treatment you gave?

A. She responded well to the treatment I gave for the condition.

Q. Your treatment stopped this excessive flowing? A. Yes sir.

(Testimony of Dr. Hoyt B. Wooley.)

Q. It had cleared up by December 14th?

A. She didn't have any flow on December 14th.

Q. Had cleared up and she was building up physically?

A. That's right.

Q. If that is true would you not have expected her to continue to build up had not something else came along?

A. I will have to answer that by saying that only upon my knowledge and experience with other cases similar can I answer. [237]

Q. You cannot answer that yes or no?

A. I cannot answer it yes or not. I don't know what the response would be from there on.

Q. What had been your experience with women who had responded to your treatment so readily in the past?

A. Similar cases.

Q. Yes, that is what I mean.

A. The only way I can answer that question is the fact that you may give this medication to patients and they respond for varying periods of time, and then there comes a time when they don't respond, that is, you don't get any response to the treatment.

Q. Where you give the treatment and get the desired results, you give the treatment to procure that result,—that is the purpose of the treatment?

A. Yes sir.

Q. So that we will have this straight Doctor, you never did give Mrs. Stanger a pelvic examination, at any time?

A. That is right.

(Testimony of Dr. Hoyt B. Wooley.)

Q. You never did examine the portion of the female organs that were removed?

A. I did not.

Q. Do you know whether during the time you treated Mrs. Stanger she gained in weight?

A. As to that I cannot say. [238]

Q. Did you take her hemoglobin count for December and November? A. Yes sir.

Q. Did she show improvement in that regard in December? A. Yes sir.

Q. How much?

A. In December,—the 14th of December 68 per cent.

Q. That would be an improvement, it was down to 42? A. To 42, yes sir.

Q. That would be an improvement in that difference? A. Yes sir.

Q. Isn't that a fast response to that treatment that you were giving, over a thirty day period?

A. No, I wouldn't say so.

Q. You would say it was normal?

A. I would say it was a good response.

Q. An average response? A. Yes sir.

Q. If you continued to treat her, in your opinion,—you would have intended to effect a complete cure, would you Doctor?

A. I don't understand that question.

Q. You don't want to say that she was completely cured on December 14, 1939?

(Testimony of Dr. Hoyt B. Wooley.)

A. She was not cured on December 14, 1939, so far as I [239] am concerned.

Q. Basing your answer on the improvement during that length of time, what length of time would it take to build her back to normal?

Mr. Thompson: Objected to as incompetent irrelevant and immaterial unless it assumes matters within the knowledge of the Doctor at the time he gave her the treatments.

Q. Basing your Answer upon the response that you recognized in Mrs. Stanger during the thirty day period and the treatment that you gave her, how much time would it take to effect a complete cure of that condition?

Mr. Thompson: Objected to as based on facts insufficient unless he says basing your answer upon the history that you received, that is, of flowing for eight to ten days over a period of four years and so forth, except during the time she was pregnant.

The Court: Overruled.

A. I cannot answer that question. I don't think it would be humanly possible to answer that.

Q. Now, Doctor Wooley, I understood you to say that excessive menstruation comes only from causes shown in the pathological report that you examined, is that correct?

A. No I will not say that, I think I later modified that.

Q. Isn't it true that excessive flowing comes from legion of causes? [240]

A. Yes.

(Testimony of Dr. Hoyt B. Wooley.)

Q. And the condition that you found in the pathological report are few of the causes?

A. One of the causes.

Q. There are literally hundreds of those?

A. Not that number.

Q. Well, a great many things that cause excessive flowing?

A. No, professionally I would not say a great many.

Q. How many are there?

A. I don't know.

Q. Are you acquainted with Doctor Hatch?

A. Yes sir.

Q. If Doctor Hatch testified that the causes are legion, would you care to agree with that statement?

Mr. Thompson: Objected to as improper cross-examination.

The Court: Yes, sustained. We do not allow a comparison of testimony.

Mr. Bowen: I appreciate the accuracy of Your Honor's ruling.

Q. Then Doctor, your statement or testimony that Mrs. Stanger had fibrous uterus is not based upon any personal knowledge that you have.

A. Yes, it is based upon the fact that I had a history.

Q. Nothing else, just the history? [241]

A. That's right.

Q. Has it been your experience that frequently a patient comes to you who describes certain symp-

(Testimony of Dr. Hoyt B. Wooley.)

toms and you find their actual trouble something else, or coming from some other cause.

A. Sometimes there are outward manifestations of a condition, when you say that come from some other cause, I don't quite understand that.

Q. Other than what the patient tells you?

A. We don't make a diagnosis on the patient's diagnosis.

Q. Then you do not make the diagnosis on what the patient tells you? A. Certainly.

Q. Well, which is it?

A. We make the diagnosis on the patient's history but not on the patient's diagnosis. We make it on the history together with the physical findings.

Q. Doctor, during the time you treated Mrs. Stanger did you have occasion, or did you ever suggest to her that she have an operation to remove the uterus to effect this cure?

A. I don't recall saying that.

Q. You didn't think that was necessary after she responded to the treatment that you gave her.

A. I didn't have time to make any decision in the case. [242]

Q. When Mrs. Stanger stopped coming to you, I think you said that you intended that she would come back again.

A. That was my understanding when she left.

Mr. Bowen: That's all.

(Testimony of Dr. Hoyt B. Wooley.)

Redirect Examination

By Mr. Thompson.

Q. During this time,—strike that—considering the case history and the pathological report what is your opinion as to the cause of Mrs. Stanger's excessive flowing?

A. Fibrosis of the uterus with hyperplastic endometrium.

Q. As of the time you were treating her?

A. That's right.

Mr. Thompson: That is all.

Recross Examination

By Mr. Bowen.

Q. Doctor, does a condition such as you found in Mrs. Stanger clear up by treatment such as you were giving her?

Q. What do you mean by clear up.

Q. You have expressed the opinion as to the cause of the flowing.

A. Yes sir.

Q. Keeping that in mind, tell me whether conditions such as that clear up with the treatment you gave, or is it [243] necessary to have an operation?

A. I will answer this question this way: There are no two responses alike, that is, identical. One may respond one way and another another way. Under the circumstances one certainly would not have been within good medical practice to have done other than try to build the person up generally when the hemoglobin is 42, they would not have been

(Testimony of Dr. Hoyt B. Wooley.)

doing other than practicing good medicine by trying to stop the condition which was drawing the patient down. Now whether the treatment that I gave would have been of such a prolonged effect as to bring about a clearing up of the condition so that she would not have had to resort to surgery I cannot answer because I didn't have an opportunity to continue the treatment, but it had been my experience that these cases respond differently, but ultimately to effect a complete cure, surgery is necessary.

Q. In all cases.

A. Of this particular condition of fibrous uterus and hyperplasia, if you want to use the word cure.

Q. To effect a stopping of the excessive flowing it is necessary to remove the uterus.

A. To stop excessive flowing?

Q. Yes.

A. That depends on the response of the individual patient, [244] if you cannot stop the flowing, or if it goes along for such a period,—a continued period and you cannot stop it then there is nothing but surgery to resort to. That depends on the individual and also on individual ideas, there are a lot of people who would rather put up with one thing, or one condition, and a lot that would rather have it done and get it over with immediately. You are dealing with individuals and specific conditions. All individuals don't respond the same.

Q. Can you answer this question, Will you say that in order to stop excessive flowing where the

(Testimony of Dr. Hoyt B. Wooley.)

uterus has become fibrous that an operation is always necessary?

Mr. Thompson: I object to that, he has answered the question before.

The Court: Yes, we are repeating now.

Mr. Bowen: That is all.

Mr. Thompson: That is all.

W. W. BROTHERS

Called as a witness on behalf of the defendant after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Anderson.

Q. State your name please Doctor.

A. W. W. Brothers.

Q. You reside at Pocatello? A. Yes sir.

[245]

Q. Your profession is what?

A. Physician and surgeon.

Q. How long have you been practicing in Pocatello? A. Since November 1919.

Q. Are you licensed to practice in the State of Idaho, as a physician and surgeon?

A. Yes sir.

Q. What school are you a graduate of?

A. Northwestern.

Q. Have you taken any post graduate work since graduation? A. Yes sir.

(Testimony of W. W. Brothers.)

Q. What is the nature of your practice, Doctor?

A. Mostly surgery, and surgical diseased, of women particularly.

Q. Have you been a physician in the Army?

A. Yes sir.

Q. And for what period of time?

A. Two years and one month.

Q. Did you examine Mr. A. G. Stanger at Idaho Falls about October 9, or 10?

A. Yes sir, October 9.

Q. Will you state, please, what that examination consisted of?

A. Consisted of taking a history of this accident in January, it occurred on January 19th, I believe it was, near Denver, and in examining his back and a general examination, but of his back in particular.

[246]

Q. How did you make that general examination?

A. I made it in the Hospital at Idaho Falls. The L D S hospital. I had him take off his shirt. I inspected his eyes, mouth teeth, throat and so on, his heart and chest and an examination of the spine. I had him move in different directions and tested his reflexes.

Q. What did you,—did you also examine some X rays taken by Doctor Cline? A. Yes sir.

Q. I show you exhibits 4, 5 and 6. Are those the X rays that you examined?

A. Yes, they are.

(Testimony of W. W. Brothers.)

Q. After examining these X-rays together with your physical examination did you find anything, objectively, wrong with Mr. Stanger's back?

A. No sir, I couldn't.

Q. Was Doctor Hatch present when you made the examination? A. Yes sir.

Q. Also when you made an examination of Mrs. Stanger? A. Yes sir.

Q. Did you find that his tonsils had been removed? A. Yes sir.

Q. Why do you,—why are tonsils removed?

A. Ordinarily because of infection in the tonsils or chronic inflammation of the tonsils. [247]

Q. What effect does such a condition of the tonsils have on a person.

A. Well, commonly they cause a rheumatic condition, pain, neuritis.

Q. Had he complained of pain anywhere?

A. He complained of pain in his spine in the region of the eighth dorsal vertebra, in the muscles.

Q. Is that about the bottom of the shoulder blade?

A. About on the level with the lower angle of the scapula or shoulder blade.

Q. At the time you examined Mrs. Stanger state what that examination consisted of, including the history she gave you of her condition.

A. Mrs. Stanger's history of the case as related by Mrs. Stanger was briefly, she said she first began excessive menstruation following the birth of the

(Testimony of W. W. Brothers.)

last baby two years ago, that she had been treated with hypodermic injections with some improvement; was feeling some better when she went on this trip. At the time of the accident she was playing bridge when the car stopped suddenly and she was thrown suddenly against the edge of the table injuring her abdomen. This made her extremely nervous and caused her to flow more, coming on immediately after the accident. She said that she flowed four or five days at a time and was never free from some bloody discharge more than three or four days at a time. She reported to [248] Doctor Hatch for treatment on February 12. She was given treatment and finally decided to operate. She was given three blood transfusions and operated in July, I think July 9, 1940. The operation was conization of cervix with removal of the ovary, the left I think, and she made a good recovery and has been gaining since that time. The present examination shows her to be a slender woman quite intelligent, pulse regular, teeth good condition, tonsils good, no apparent infection of the larynx; no murmurs, blood pressure 118/80, Abdomen, old scar right rectus in good condition, new scar slightly to the right of umbilicus, no abdominal tenderness, no masses felt. The examination showed the surface to be smooth well healed, nothing abnormal; the reflexes were normal no edema or swelling.

Q. The scar slightly to the right of the midline of the umbilicus was that a recent operation?

(Testimony of W. W. Brothers.)

A. Yes sir.

Q. From your examination which you did at that time, what had she been operated for in July 1940, do you know.

A. Yes, I read the pathological report of the tissue removed and I also talked to Doctor Hatch and that, together with the history formed my impression of the condition.

Q. Can you say from your complete examination, what impression did you form as to the cause of Mrs. Stanger's condition? [249]

Mr. Bowen: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

A. My impression of her condition was that she had been suffering for sometime from fibrosis of the uterus, chronic cervicitis, inflammation of the cervix and hyperplasia of the endometrium. This condition was improved somewhat but got worse but after her operation she was improved, satisfactorily improved.

Q. What are the symptoms of those things,—fibrous uterus, or fibrosis uteri?

A. The main symptom is excessive menstruation following by anemia, all the symptoms of anemia, such as nervousness and weakness.

Q. What is anemia, how is anemia *connection* with her condition for which she was operated?

A. Anemia is secondary to her loss of blood. She lost too much blood. More than she could replenish.

Q. How does that effect the hemoglobin test?

(Testimony of W. W. Brothers.)

A. Causes a lowering of percentage of hemoglobin.

Q. And when the flow stops for a time does the hemoglobin rise? A. Slowly rises, yes sir.

Q. What Doctor, in your opinion, is the usual cure for fibrosis uteri and the other conditions to which you referred? [250]

A. There are several different forms of treatment. Treatment with injections which are not so satisfactory but might give temporary relief, and small doses of radium which is quite effective and X-ray treatment and surgical treatment such as was done in this case.

Q. In this treatment or treatments, state whether or not the giving of this treatment would result in sterility?

A. The treatment by hypodermic injection would not. The X-ray or radium would possibly cause temporary sterility and the surgical treatment, of course, would cause sterility. The X-ray treatment does not cause permanent sterility, they don't use it to that extent.

Q. The operation which was performed did result in sterility? A. Yes sir.

Q. When is an operation performed, as distinguished from other treatment, Doctor?

A. Usually one prefers to use X-ray or radium, that is, child bearing age. If a person is near the menopause then it doesn't make so much difference and is usually preferable.

(Testimony of W. W. Brothers.)

Q. Is there any connection, or relation between fibrous uterus and the menopause under any condition?

A. Fibrosis as a rule gets worse as a patient gets older up toward the menopause.

Q. Assuming the history that Mrs. Stanger gave you about [251] excessive menstruation following the birth of her last baby, approximately two years ago. What is your opinion as to what that condition was, or what it was leading up to. Did that have any connection with the fibrosis uteri?

A. Yes, I think it did.

Q. To what do you attribute the excessive flowing that she was experiencing?

A. Hyperplasia of the endometrium and fibrosis of the uterus.

Q. Is it your opinion from your examination and history that you received that the operation such as Doctor Hatch performed would ultimately be necessary?

A. Yes, I think it would.

Mr. Anderson: That is all.

Cross Examination

By Mr. Bowen.

Q. Would you still answer that, that you think it would, if this woman had been your client,—your patient and you had been treating her and she had been responding to other treatment, would your answer to this be the same?

(Testimony of W. W. Brothers.)

A. Not if she was getting well, I would not advise an operation, no.

Q. If Mrs. Stanger had been treated by some other treatment by the giving of shots, and if she had responded, and her hemoglobin had built up from 42 to 68 over a period of thirty days would you expect a cure from that treatment? [252]

A. I would not expect a cure.

Q. Would you expect a correction of the excessive flowing?

A. I think she could have been relieved.

Q. Excessive flowing could have been corrected if that treatment had been continued?

A. It is necessary to keep up that treatment.

Q. Did you testify that you always find excessive flowing where the uterus has become fibrous, is that always the case?

A. Not always but usually.

Q. Is it the average case?

A. Usually they do have excessive flowing.

Q. Is that more likely as the uterus may become fibrous?

A. Yes sir.

Q. You are on the medical staff of the Union Pacific Railroad Company?

A. Yes sir.

Q. Have been for a good many years?

A. Yes sir.

Q. I think you stated that Mrs. Stanger told you she was riding in the car and playing bridge when the car suddenly stopped?

A. Yes sir.

(Testimony of W. W. Brothers.)

Q. She didn't say anything about the car being wrecked?

A. Yes, I understood that was the case.

Q. I was wondering what she said to you, that she was in a [253] wreck or the car suddenly stopped.

A. I don't remember just exactly what she said except that she was playing bridge.

Q. Did she tell you that she was thrown forward and struck her abdomen across the edge of the card table?

A. Yes sir.

Q. Now, referring to Mr. Stanger, when an infection or trouble in the system is being caused by or from infected tonsils I think you stated that frequently happens?

A. Yes, it does.

Q. When the tonsils are removed do you expect that condition to clear up?

A. You usually do, yes.

Q. Where the trouble is coming from the tonsils?

A. Yes, sir, not always, but usually.

Q. How soon do you note improvement where the infected tonsil is causing the trouble?

A. In the course of a few weeks.

Q. Shortly it starts to clear up?

A. Usually.

Q. If pain and discomfort continue that you naturally assume that the trouble was not coming from the tonsil?

A. Not necessarily, they are not always relieved by the removal of the focus of the infection.

(Testimony of W. W. Brothers.)

Q. If you remove the focus of the infection you would expect to be relieved from discomfort that it was causing? [254]

A. Not always.

Q. Is that the general rule?

A. Yes, usually they are.

A. You stated that in your examination of Mr. Stanger you found no objective symptoms that could cause pain and discomfort?

A. That's right.

Q. Were there present any subjective symptoms?

A. Yes, he said he had pain and tenderness in the muscles on either side of the eighth dorsal vertebra.

Q. Did you run your hand down the spine or make any examination?

A. Yes sir.

Q. Did he wince or give evidence of pain?

A. Not particularly he said it was tender in those spots.

Q. Referring to exhibits 4, 5 and 6, isn't it true that those exhibits are what you would call poor X-rays of the dorsal region?

A. No, I think they are fairly good pictures.

Q. Could you look at exhibits 4 and 6 and determine from them, or would you want to base a diagnosis on exhibits 4 and 6, that there was an injury in the region of the dorsal vertebra?

A. I think one could be rather safe in saying that there was no injury, no fracture.

Q. You would not want to say from those ex-

(Testimony of W. W. Brothers.)

hibits that there [255] could not be a thickening or thinning of the intervertebral disc.

A. You can't see those discs.

Q. You can see the space? A. Yes sir.

Q. If there was a thickening or thinning they should show up?

A. You would know that by the difference in the space between the vertebra.

Q. Are those pictures clear enough to determine that? A. Yes, sir, I think so.

Q. Examine this as to the eighth dorsal.

A. This spine is hidden by the heart shadow.

Q. Now, look at number 4.

A. The same is true in that case.

Q. You would be unable to state from either of those whether there was an injury to the vertebra in that region?

A. I would not expect to make a diagnosis from an anterior to posterior picture.

Q. You can tell from, or can you, from looking at this X-ray whether there is an injury to the dorsal vertebra? A. No sir.

Q. In fact X-rays don't show pain?

A. No, they don't.

Q. Is it true that subjective symptoms may be,—that a pain caused or discomfort caused, and that you classify as under subjective symptoms may be just as serious as [256] if the symptoms were objective? A. I don't quite understand that.

(Testimony of W. W. Brothers.)

Q. Isn't it true that you may have an injury just as serious which may be only indicated by subjective symptoms as an injury that may be indicated by objective symptoms?

Mr. Thompson: Objected to as it assumes that subjective symptoms can be determined by the physician, and the contrary is in the record.

The Court: Can you answer that Doctor?

A. In a way, I can. Subjective symptoms should be backed up by objective findings. Subjective symptoms are what the patient tells you, of course, when they have a pain for instance in the heart condition, then one can find objective reasons for that pain. It may be a serious condition.

Q. It is just as serious as though the symptoms were objective?

A. You don't speak of symptoms as being objective. You speak of objective findings.

Q. I was using the word that counsel used. Do you know when Mr. Stanger had his tonsils out?

A. No sir, I think he said something about Doctor Hatch taking them out.

Q. You looked in his throat? A. Yes sir.

Q. Was it a good job of removing tonsils? [257]

A. They looked all right to me.

Q. Did you notice any infection in his throat?

A. No particular inflammation in his throat.

Q. Did you examine his nose and ears?

A. No, I didn't make an examination of his nose and ears.

(Testimony of W. W. Brothers.)

Q. Nothing to indicate that any trouble was coming from his nose and ears?

A. No sir, I didn't think so.

Q. You didn't want the Court to understand that you are saying that Mr. Stanger doesn't suffer pain in the dorsal region of his spine? A. No sir.

Q. Doctor, is excessive flowing ever caused by physical violence or injury?

A. Not unless there is a direct injury to the organ.

Q. You don't think there could be enough violence or force, trauma I think is the term, applied to the outside surface to produce excessive menstruation?

A. Not unless there was some pathological condition, not in a normal uterus.

Q. In a uterus that is not normal?

A. That is possible that it might increase the flow for a time.

Q. A violent blow across the abdomen would contribute to the excessive flow in a uterus not normal?

A. Might be a contributing cause.

Q. Probably would be a connection between the two. [258] A. Yes.

Q. Would the severe nervous shock followed by, or received at the same time, or followed by the physical injury and high nervous tension, would that tend to contribute to excessive flowing?

A. To some extent this increase of nervousness, to some extent.

Mr. Bowen: That is all.

(Testimony of W. W. Brothers.)

Redirect Examination

By Mr. Anderson.

Q. You say to some extent, can you be more definite on that. Would it be permanent or temporary?

A. Temporary.

Q. For what duration?

A. I think all those symptoms would clear up with a few days rest.

Q. I believe you said if there was an abnormal or diseased uterus, this wreck might have contributed to the cause. What do you mean by that?

A. I think it might possible cause some increase in the flow in an abnormal uterus.

Q. For the duration of time you referred to?

A. Yes, I think it would be temporary.

Q. What would you say of the nervous situation, or condition would that be the same?

A. Yes, I think that would be temporary. [259]

Q. With respect to Mrs. Stanger counsel referred,—I should say Mr. Stanger, counsel referred to exhibits 4 and 6, but he did not refer you to exhibit 5, now, refer to exhibit 5 and state whether you can tell from that exhibit whether there was an injury to the spine?

A. I think this was a very good picture of the spine, laterally, better than many we have.

Q. What does it show?

A. It doesn't show any injury.

(Testimony of W. W. Brothers.)

Q. Counsel asked whether he may be suffering pain, state whether your examination disclosed any reason for pain? A. It did not.

Mr. Anderson: That is all.

Recross Examination

By Mr. Bowen.

Q. In answer to Mr. Anderson you stated that following a nervous condition would contribute to excessing flowing. I will ask you if it is not true that it would contribute to the length of time it would continue in the individual?

A. That question isn't clear I don't understand it.

Q. I will try to reframe it. You said that excessive flowing may be contributed to by being in this wreck, and that it would, or might be contributed to by injury, or might be contributed to by nervousness, that would be only temporary.

A. Yes sir. [260]

Q. As to the length of time, the length of time it may continue, would that depend on the strength of the individual? Would it not continue until the nervous strain or tension was relieved or taken care of?

A. I think to some extent. It would depend on how long she was nervous. It would be rather minor if she went to bed and rested she would probably get over that in a few days.

(Testimony of W. W. Brothers.)

Q. Could you say that the condition would contribute to increased flowing during the time that the nervousness or the nervous tension existed.

A. One cannot say whether that is true or not.

Mr. Bowen: That is all.

Mr. Anderson: Yes, Doctor, that's all. [261]

L. R. NICHOLS

Being called as a witness on behalf of the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Anderson:

Q. State your name? A. L. R. Nichols.

Q. Where do you reside Mr. Nichols?

A. La Salle.

Q. What is your occupation?

A. Mechanical foreman.

Q. For whom?

A. The Union Pacific Railroad Company.

Q. How long have you been employed at that?

A. Thirty-three years.

Q. Were you at LaSalle in January 1940 when there was a derailment of train number 4?

A. Yes sir.

Q. How far is LaSalle from the point of derailment?

(Testimony of L. R. Nichols.)

A. The derailment was at Houston, Colorado.

Q. Did you go to the derailment?

A. Yes I did.

Q. How soon did you arrive there, after the derailment?

A. About fifteen minutes, fifteen or twenty minutes.

Q. State what you found in reference to the condition of [262] the train,—did you find a train?

A. Yes, a train there and part of it was derailed.

Q. How about the head end of the train, was it derailed?

A. No, the engine and the first two cars were on the track.

Q. Did you pay any attention to the number of cars in the train? A. Six, I think there was.

Q. Did you,—after you go there did you endeavor to determine what had caused the derailment? A. Yes sir.

Q. What did you find?

A. Found a broken wheel.

Mr. Witty: Objected to as incompetent, irrelevant and immaterial. Not within the issues in this case. It is an attempt to prove an affirmative defense which has not been pleaded.

The Court: This objection under sub-section (c) of rule 8, on the ground that one pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence,

(Testimony of L. R. Nichols.)

discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches,—now, an examination of the answer shows that it seems to be a specific denial of the complaint with no affirmative defense set up, rule 8 sub-section (c) in addition [263] to what I read, mentions; license, payment, release, *res judicata*, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. There is no affirmative defense set up here. The rule seems to require that if a party wants to set up avoidance it must be pleaded, but we have sub-section (b) of rule 15 relating to amendments to conform with the evidence and reads as follows: “When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure,” and so on.

Now, I am confronted under these two rules with this situation; the parties proceed on the pleadings as filed here, and we have proceeded to the extent of two witnesses having testified to these matters with no objection, and thereafter a motion was made, after the court announced an adjournment,—a motion to strike certain evidence. There is no question

(Testimony of L. R. Nichols.)

but what we proceeded with implied consent. Now, rule 15 provides for amendments to conform with the evidence, and then the party will have to make a showing that [264] they will have to have a continuance to meet these matters by reason of being prejudiced. This rule 15 is broad about amendments because it says that the Court must freely allow amendments to conform with the proof. We are proceeding now under a set of rules that may not permit such evidence but the Court can allow amendments to permit the proof. Let's see what we have here. You have charged defective equipment and now, they come in and offer evidence as to the condition of the equipment. I think we have an issue here; you have charged defective equipment and they have made a denial I think it makes an issue. The motion to strike will be denied and the objection to the evidence is overruled.

Q. Mr. Nichols, did you locate all of the parts of the broken wheel? A. I did.

Q. State whether or not there was a part of the wheel left on the axle. A. Yes sir, the plate.

Q. Then how many other pieces did you find?

A. Five.

Q. State whether or not the breaks on these parts were new or old breaks.

A. All new breaks.

Q. What did you do with these parts? [265]

A. Collected them all up and packed them and

(Testimony of L. R. Nichols.)

shipped them from LaSalle to Doctor Barr in Omaha.

Q. What do you know about Doctor Barr? Who is he, what is his title or what he does on the Railroad?

A. At that time he was engineer of tests.

Mr. Anderson: You may cross examine.

Cross Examination

By Mr. Bowen:

Q. You say that you collected these broken parts of the wheel. Did you yourself collect the broken parts?

A. Yes sir.

Q. Where did you collect them from?

A. Alongside the track.

Q. Did you gather up all the parts of the wheel?

A. Five broken parts of the rim.

Q. You then had a complete wheel?

A. A complete rim of the wheel. The plate and hub was on the axle.

Q. After you got through collecting the wheel and put the parts back together did you have the wheel in the same form as it was before it was broken, or was there any parts missing?

A. It was all there.

Q. And the parts all fit together?

A. Yes sir.

Q. You, of course, do not attempt to state what caused it [266] to break?

A. No sir.

Q. There were six cars in this train, you said?

(Testimony of L. R. Nichols.)

A. Yes sir, as I recollect but I would not be sure about that.

Q. There may have been more or less?

A. Yes sir.

Q. Can you tell us anything as to the age of the wheel? A. No I cannot

Q. Or the type or the make? A. No sir.

Mr. Bowen: That is all

Mr. Anderson: That's all.

The Court: We will recess until 10 tomorrow morning.

10 O'clock A. M. Oct. 22, 1941

JOHN A. SCHRODER

Being called as a witness on behalf of the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Anderson:

Q. State your name please?

A. John A. Schroder.

Q. Where do you live? A. Denver. [267]

Q. What is your occupation?

A. General Car foreman, Union Pacific.

Q. How long have you been general car foreman?

A. At Denver a little over five years.

Q. How long have you been with the Union Pacific? A. Since 1920.

(Testimony of John A. Schroder.)

Q. In what department?

A. Car department.

Q. Were you general foreman in January,—on January 14, 1940? A. Yes.

Q. Do you recall a derailment at Houston, Colorado, on January 14, 1940? A. Yes sir.

Q. Did you go out there? A. Yes sir.

Q. How long after the derailment did you get out there? A. Approximately two hours.

Q. What did you find when you got out there? In reference to the head end of the train, state whether it was on the track or not.

A. The head four cars were on the rails.

Q. Was there an engine ahead of these cars?

A. Yes sir.

Q. Was it on the track?

A. It was on the track. [268]

Q. Did you make an inspection of these four cars? A. Yes sir.

Q. What did you find?

A. The first three cars, there were no defects, the fourth car which was a coach had a broken wheel on the truck, the lead wheel on the right side of the truck.

Q. How much of the broken wheel was left on the truck?

A. Approximately 16 inches of the plate.

Q. State whether you inspected this,—first did you inspect the other cars the three ahead, as well

(Testimony of John A. Schroder.)

as this one to determine whether or not there was anything missing from those cars?

A. Yes, I did, and there were no car parts missing.

Q. Did you inspect the track west or toward Houston from the point where the head end of the train was to the derailed cars?

A. Back to the derailed cars.

Q. Yes. A. Yes, I did.

Q. Did you find anything along the track,—state what you found,—did you find anything between these cars back to where the other cars were derailed?

A. No sir, no car parts.

Q. Part of the wheel was on the axle?

A. Yes.

Q. Did you inspect that? [269] A. Yes.

Q. State whether or not the breaks were old of new breaks?

A. All new breaks.

Q. Can you give me the consist of that train,—what did it consist of?

A. Yes, a mail car, two baggage cars, a coach, pullman tourist, another coach, a pullman standard and another car, a cafe lunch car.

Q. Eight cars? A. Yes sir.

Q. Four coupled to the engine? A. Yes sir.

Q. Any derailment of the cars coupled to the engine?

A. No sir, all wheels were on the rails.

Q. This Pullman were you on the inside of the car after the derailment?

(Testimony of John A. Schroder.)

A. Yes sir, after I had the car back on the rails.

Q. State whether or not there were anything in the way of parts, whether there was anything broken inside of this car? A. No broken parts.

Q. Were there,—state whether or not any seats were broken? A. No sir.

Q. Or windows? A. No sir.

Q. Did you find any loose bolts? [270]

A. No sir.

Q. Or anything of that sort. A. No sir.

Q. Where was the damage to this car?

A. On the underneath side, on the outside of the car.

Q. Was there any truck of this pullman car that had come out from under this car or the preceding car? A. No sir.

Q. Have you made measurements of the section in a Pullman car as well as measurement concerning the ordinary card table that is placed between the seats? A. Yes sir.

Q. Can you give those dimensions?

A. The top of the table is 27 inches,—from the table to floor; to the top of the seat free height $16\frac{3}{4}$ inches; from the top of the seat to the top of the table free height $10\frac{1}{4}$ inches; width of the table $27\frac{3}{4}$ inches.

Q. From back of seat to back of seat.

A. $57\frac{1}{2}$ inches.

Q. Are those cushioned seats? A. Yes.

(Testimony of John A. Schroder.)

Q. Did you have any other measurements on the seat backs?

A. Head rest to head rest 64 inches.

Q. Are the backs cushioned?

A. Yes sir. [271]

Q. Did you measure from the seat up to the top of the back of the seat?

A. No sir, I have no measurement on that.

Mr. Anderson: That's all. You may examine.

Cross Examination

By Mr. Bowen:

Q. How did you find out about this wreck?

A. I was notified by the master mechanic.

Q. What did he tell you?

A. That number four was derailed.

Q. You got there in about two hours.

A. Yes sir.

Q. Was the engine and train crew there when you got there?

A. Yes sir, both were there.

Q. What does the engine crew consist of?

A. Engineer and fireman.

Q. Both were there? A. Yes sir.

Q. Do you know the engineer and fireman?

A. The engineer was Mr. Lewis and I don't know the fireman.

Q. Who was the train's conductor?

A. Mr. Cross.

Q. Do you know either brakeman?

(Testimony of John A. Schroder.)

A. No sir.

Q. Was there a pullman conductor?

A. I don't know. I didn't see him. [272]

Q. You don't know whether there was a pullman conductor there on that Pullman standard or not?

A. I didn't see a pullman conductor.

Q. Were there any porters?

A. I don't know. I didn't see any pullman porter.

Q. Do you know whether there was one or more pullman porters?

A. I didn't see a pullman porter.

Q. I think you said that the trucks of this pullman car had not left the track?

A. I didn't say that.

Q. Then I will ask you, did they leave the track?

A. Yes sir.

Q. Which side did they go off on?

A. The car went on the north side.

Q. The right or left hand side?

A. The right hand side in the direction *in* was moving.

Q. You are sure that would not be the south side.

A. As I recall it would be the north.

Q. If some of the witnesses testifies that the cars went off on the south side that would be wrong?

Mr. Thompson: Objective as argumentative and a comparison with other witnesses testimony.

(Testimony of John A. Schroder.)

The Court: Sustained. A comparison of testimony of one witness against another is not recognized here.

Q. Now, you don't profess to testify as to what caused this wreck? [273]

A. No sir.

Q. You don't know what caused it do you?

A. It was the broken wheel is all I know.

Q. You don't know what else may have been wrong?

A. No sir.

Q. You don't always have a wreck because of a broken wheel.

A. That is the first broken wheel I ever saw under a passenger car.

Q. How many wheels on this truck under the standard pullman?

A. Six, three pairs under each end.

Mr. Anderson: You are asking under the pullman?

A. Under the pullman car.

Q. Twelve wheels under this pullman car?

A. Yes sir.

Q. Can you describe just generally, how these trucks are constructed, how they are held on?

A. Generally cast in one unit, a unit which holds the wheels and axles, there are axles, wheels, journals in journal boxes and they are all equipped with equalizers to equalize *the* for in any road shock, and all cushioned on springs both elliptic and coil.

(Testimony of John A. Schroder.)

Q. What is the distance from the front truck to the back truck?

A. That would depend on the size of the car.

Q. This particular car, do you remember the size?

A. No sir.

Q. Where was the front truck when you got there? [274]

A. Under the car?

Q. And attached to it?

A. Yes sir.

Q. Was the car level or one end up higher?

A. The front end was down in the ditch further and would be lower.

Q. How deep was the borrow pit there?

A. The grade was not over four feet I would say.

Q. Was the ground frozen?

A. Just a shell on top.

Q. Now, this broken wheel that you testified about was that under the car that had not been derailed or under that car,—or a car that had been derailed?

A. A car that had not been derailed.

Q. The broken wheel was on the car ahead of the first derailed car?

A. That is right.

Q. You stated that there were no car parts missing, were there any parts missing of this broken wheel?

A. The wheel was broken and the parts that had come from this broken wheel was along the right of way, I didn't see them.

(Testimony of John A. Schroder.)

Q. You did not refer to the wheel when you said there were no car parts missing?

A. No sir, not the wheel.

Q. You inspected the track?

A. Yes sir. [275]

Q. Your duties as car foreman do you inspect the tracks?

A. I referred to that as an inspection of the vicinity to see if any car parts were missing?

Q. You made no inspection of the track?

A. No sir.

Q. As to the gauge of the track you would not be able to tell us? A. That's right.

Q. You said that all of the wheels were on the track, which wheels do you refer to?

A. Which car have you reference to?

Q. You said all the wheels were on the rails.

A. No, some were off the rails.

Q. Some were off the rails?

A. Yes, on the derailed cars.

Q. How many wheels were off the rails?

A. All of the cars that were derailed.

Q. How many would that be?

A. There were four cars.

Q. Would the same number of trucks be under all the cars as the Pullman you testified about?

A. Yes sir.

Q. What did you mean by no car parts missing?

A. No brake riggings, or coupling gear or any part pertinent to the operation of the car.

(Testimony of John A. Schroder.)

Q. This pullman, how was it located? [276]

A. Upright with a slight leaning, the rear end of the car was approximately eight or ten feet from the rail and the head end probably fifteen feet. At an angle.

Q. Was any part of this pullman car on the side of the car touching the ground.

A. No part of the side was on the ground.

Q. Just the underneath part was touching the ground? A. Yes sir.

Q. No windows broken in the car?

A. No sir.

Q. You looked for that? A. Yes, I did.

Q. Nothing disturbed inside of the car?

A. They were all in place.

Q. Any of the seats torn loose?

A. No sir.

Q. Any of the berths fallen down?

A. No sir.

Q. Any upper berths down? A. No sir.

Q. No pieces of metal or screws or bolts laying around there? A. No sir.

Q. No dirt on the floor?

A. Just foot tracks, nothing shaken down or anything like that.

Q. The inside of the pullman car was in a normal condition? A. That's right. [277]

Q. This table which you referred to was a card table? A. Yes sir.

(Testimony of John A. Schroder.)

Q. Did you find a card table there that had been in use recently?

A. I don't recall any individual table in this car.

Q. Did you look for a table to see if one had been in use recently?

A. No, because it is a accessory and not a standard part of the car.

Q. There may have been one in use recently?

A. I cannot say.

Q. How are they attached to the car?

A. There are wall brackets and there are two lugs; these lugs are placed in the wall and the table comes to its normal position with these lugs being in the wall.

Q. Is there anything on the outside of the table?

A. Yes, folding leg.

Q. How wide or deep is the top portion of that table?

A. About approximately half an inch.

Mr. Bowen: That is all

Redirect Examination

By Mr. Anderson:

Q. The Broken wheel was on which car?

A. Union Pacific Coach 1224.

Q. Which car was that from the Engine?

A. The Fourth car. [278]

Q. Did you state that all four of these cars were on the rails?

(Testimony of John A. Schroder.)

A. Yes sir, and the mate wheel of the broken wheel was on the rail when I arrived there?

Q. And the engine was on the track?

A. Yes sir.

Q. Which side of the train as it was moving was the broken wheel on? A. The right.

Q. On the side that it went off the track?

A. The Broken wheel was not off the track, it was on the right side referring to the movement of the train.

Q. Would that broken wheel be on the side on which the Pullman car went off the track?

A. On the side the Pullman car went off, yes.
Mr. Anderson: That's all.

Mr. Bowen: That's all. [279]

CLAUDE R. PFLASTERER

Being called as a witness on behalf of the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Anderson:

Q. State your name?

A. Claude R. Pflasterer.

Q. Where do you reside?

A. Omaha, Nebraska.

Q. What is your occupation?

A. Metallurgical engineer, for the Union Pacific.

(Testimony of Claude R. Pflasterer.)

Q. How long have you been a Metallurgical Engineer?

A. Doing that work since 1921, and had the title since 1936.

Q. What do you do as a metallurgical engineer for the Union Pacific Railroad Company?

A. Make investigations of new materials and materials that have failed.

Q. Testing metals? A. Yes sir.

Q. All kinds? A. Yes sir, all kinds.

Q. Are you a licensed engineer in the State of Nebraska?

A. Yes sir, a licensed professional engineer.

Q. In the field in which you are engaged.

A. Yes sir. We do outside work too. [280]

Q. Mr. Pflasterer, did you have occasion to test,—make any test of a wheel that was broken in a derailment at Houston, Colorado, January 14, 1940?

A. Yes sir.

Q. What did you test that for?

A. To determine the cause of the breakage.

Q. Did you determine the cause of the breakage? A. Yes sir.

Q. Will you explain to the Court what your test or inspection disclosed?

A. This wheel was sent to the laboratory and we made an examination to determine the initial cause of the breakage, an examination of the metal, we cut a section adjacent to the point of the fracture and placed it in a solution of acid to develop

(Testimony of Claude R. Pflasterer.)

the structure and to see if there was any internal structural defects at the point where the fracture extended to the surface. That etching shows that it was clean, dense structure showing no defect in the plate area. The original and initial fracture took place in the plate circumferentially on the back side and the fracture went around in the thinnest point of the wheel, and out through the rim. You could see where the break started, that is indicated by the texture of the steel, you could see where it ruptured. The outside of the plate edge is serrated, so there is no mistake but what it started on the back side, or the flange side of the [281]wheel and extended to the outside. I took drillings to determine the chemical properties. All wheels are bought under specifications that they have certain physical properties and chemical properties, that is done at the mill by our inspectors, that is, they are inspected after being made under the specifications, they are then inspected for diameters, plate thickness and so on.

Q. Did you make a chemical analysis?

A. No sir, I prepared the drillings however.

Q. I show you exhibits "8" and "9". What are those exhibits?

A. They are both broken portions of the wheel. This is negative number 4838 L.

Q. Just what is the exhibit?

A. Exhibit "8"

(Testimony of Claude R. Pflasterer.)

Q. Yes.

A. It is the plate section of the wheel as removed from the axle, this is the portion that broke off.

Q. And exhibit "9"?

A. It is a portion of the plate and the rim and flange section of the wheel.

Q. Those are photographs of the wheel?

A. Yes sir, taken under my supervision.

Q. Are they accurate pictures of this wheel which you have testified to testing?

A. They are photographs of that wheel. [282]

Mr. Anderson: We offer exhibits 8 and 9 generally for the purpose of illustrating what the witness is talking about.

Mr. Bowen: May we ask a question or two for the purpose of an objection?

The Court: You may do so.

Q. By Mr. Bowen: Directing your attention to exhibit 8, was all of the matter that appears in the photograph, was that all on there at the time you received this object shown here?

A. You want to know if that is the condition of the wheel when I first seen it.

Q. Yes.

A. Yes sir, I seen that portion on the axle at Houston.

Q. Was everything shown in exhibit 8 on there at the time you received it?

(Testimony of Claude R. Pflasterer.)

A. I am wondering if this little marking here, "outside face" was on there. I placed that on there.

Q. Where did you get this wheel or the parts from? A. From the store department.

Q. Do you know how many hands it had gone through before you received it? A. No sir.

Q. Did you go to the scene of the wreck?

A. Yes sir.

Q. How soon after the wreck? [283]

A. The wreck was Sunday morning and I was there Monday morning a little after five.

Q. Did you remove the broken portion of the wheel while you were there? A. No sir.

Q. Did you gather up the broken pieces of the wheel while you were there? A. No sir.

Q. Do you know who did, if anybody?

A. Yes, I know one man that helped.

Q. Do you know who else helped?

A. I was not there and all I know is what they told me.

Q. You were not there.

A. I was not there when the portions of the wheel was picked up, they shipped it in on the stream liner.

Q. Who picked them, who did you get them from?

A. They were put on the Stream Liner.

Q. You don't know.

A. They were put on the stream liner and addressed to Dr. Barr and removed to the laboratory,

(Testimony of Claude R. Pflasterer.)

as soon as they could be removed, they brought them down.

Q. Do you know everything you are testifying about from your personal knowledge?

A. Certainly.

Q. You were not there when this was all done.

A. No, not when it was picked up. [284]

Q. When did you see the broken fragments, not the parts on the axle?

A. I saw them in the morning,—Tuesday after the accident .

Q. The derailment was when?

A. I saw them on Tuesday after I returned from Denver.

Q. Your testimony is the same as to exhibit 9 as it has been to exhibit “8”?

A. I guess I don’t understand.

Q. Was the object shown in exhibit “9” as to how you came in possession, when and the manner in which you came in possession, the same as you have testified to in regard to exhibit “8”?

A. They came to me. There were five pieces, they were delivered to the laboratory platform and I brought them in, mounted them on this Board and assembled them in the correct position when I cut the specimen.

Mr. Bowen: We move to strike that part of the answer about assembling them in the correct position as being a conclusion on the part of the witness.

The Court: It may be stricken.

(Testimony of Claude R. Pflasterer.)

Q. Did the objects indicated on exhibit "9" come into your possession in the same manner and at the same time as the objects shown in exhibit "8" came into your possession?

A. You want me to say no——

Q. I want you to answer the question. [285]

A. These fragments of the wheel were delivered to be in five pieces as you see them here. Then I got this section and prepared it for the etching test.

Q. When did you get the broken portions as indicated in proposed exhibit "9"?

A. I got them Tuesday morning.

Q. After the wreck. A. Yes sir.

Q. You testified that you did not see them before you received them?

A. That's right, these are the parts I didn't see.

Q. You didn't.

A. I didn't see these until they were delivered to the laboratory.

Mr. Bowen: We object to the introduction of exhibits "8" and "9" for the reason that it now appears that this witness never did see the portions of the wheel that he has constructed for this purpose, prior to the time they arrived in his office. No foundation has been laid with this witness for the introduction of these exhibits. He did not see the broken portions of the wheel at the wreck, someone sent some broken portions of a wheel to his office and he assumed from hearsay that they

(Testimony of Claude R. Pflasterer.)

were portions of the broken wheel. There is no continuity of possession. It is too remote and no proper foundation is laid. [286]

Mr. Anderson: I will ask a few more questions if I may and then reoffer the exhibits.

The Court: Very well.

Q. State whether or not this broken wheel,—these broken parts of the outside of the wheel fit the core of the wheel that you saw on the axle at Houston? A. Yes sir.

Q. How were those parts shipped to your Department, did they come crated or boxed?

A. They came,—they put them in the baggage car and put tags on them, package numbers 89, 90 and so on.

Q. Where were they shipped from?

A. La Salle, by Mr. Nichols.

Mr. Bowen: We object to that as a conclusion.

By Mr. Bowen:

Q. Were you present at the time the portions of the wheel were shipped? A. No sir.

Mr. Anderson: I reoffer the exhibits.

Mr. Bowen: So that your statement is a conclusion.

A. No it is not, I have the shipping notice that we got, it was marked from Mr. Nichols at La Salle the date this package bears, I happen to have that in my possession.

Mr. Bowen: We object to his testifying as to hearsay evidence and we move that it be stricken.

[287]

(Testimony of Claude R. Pfisterer.)

Mr. Thompson: Mr. Nichols said that he gathered these up, took the portions to the car and shipped them to Dr. Barr

The Court: Objection overruled, he traces it properly.

Mr. Anderson: I think we offered them again, if not, we now offer exhibits "8" and "9"

The Court: What do they purport to cover? Do they purport to cover the broken portions of this wheel?

A. They are photographs of the broken wheel involved in the derailment at Houston, Colorado.

The Court: When did you arrive at the scene of this accident?

A. Monday morning about 5:30.

The Court: Did you examine the broken wheel?

A. The portion on the axle.

The Court: Does the exhibit represent correctly the parts of the wheel that you examined when you got there?

A. Yes, these fit together.

The Court: The rule is that a photograph of the place where an accident occurs, or what was there at the time, are admitted if the conditions appear on the photograph are the same as at the time of the [288] accident, for illustrative purposes. This witness seems to say that he appeared and examined this wheel, the parts of the broken wheel and this photograph was taken afterward and that they show the condition the same.

(Testimony of Claude R. Pflasterer.)

Mr. Bowen: My objection goes to the broken parts that this witness did not see and didn't *seen* until someone delivered some broken parts to his office.

The Court: Is that true?

A. I saw one part on the axle.

The Court: Then why did you say that you saw the broken parts.

A. I saw the part that was on the axle and these parts that I received fit on that part perfectly.

The Court: Of course, you have to see what you take a photograph of.

Mr. Thompson: I have this to say if the Court please, I think he said with respect to the core of the wheel, that he saw that at Houston, Colorado and I want to clear this up, because this witness has made no deceptive statement. Mr. Nichols said that he picked up the rest of the wheel and shipped it in, this man says he *say* the portion of the wheel on the axle and these parts fit perfectly.

The Court: The physical conditions must be shown to be the same as existed at the time of the accident. Mr. Nichols said that he picked these parts [289] up and sent them in, and this man fixed it up and had it photographed.

Mr. Anderson: Yes sir.

The Court: The two witnesses gave a complete identification. I think in view of Mr. Nichols' testimony and this witness's testimony, to the effect that

(Testimony of Claude R. Pflasterer.)

Mr. Nichols gathered the parts up and sent them in at the time of the accident and they were received in the ordinary way. I will admit them for illustrative purposes with that limitation, to aid the Court, if possible, I will admit them.

Q. Mr. Pflasterer, you didn't explain what caused this wheel to break?

A. They didn't ask me.

Q. Will you answer that?

A. Yes sir. This wheel broke due to internal stress that are locked up in the plate that develop during the manufacture. The way we determine if such stress existed, we cut through from the hub through the plate, before they are cut you place punch marks every two inches and when the cut is made you observe the behavior of the wheel, in this case the tool bound and it was necessary to put in a wedge and continue through the wheel.

All the railroads purchase wheels under "A R A" and when they were not control cooled we sometimes had this. The reason these stresses are set up is due to [290] the difference in heat. In the construction of the wheel the outside portion is a heavy mass and the hub is a heavy mass, the plate is thin and unless it is control cooled these stresses set up, and they were there.

Q. What is the A R A?

A. American Railway Association.

Q. What is that?

(Testimony of Claude R. Pfisterer.)

A. An association that makes the specifications for the manufacture of wheels, A R A conforms to the railroad specifications all over.

Q. Does that extend over the United States?

A. Yes sir.

Q. What railroads does the A R A cover, is it the Class A railroads? A. Yes sir.

Q. Do you know what the Class A roads are?

A. They are the best.

Q. For instance what are they through Omaha?

Mr. Bowen: Objected to as leading.

The Court: Yes, it is leading.

Q. You say they are class A railroads, is one of them the Union Pacific?

Mr. Bowen: And the Union Pacific goes through Omaha.

Mr. Anderson: If you will agree to those matters we won't go into the matter. [291]

Mr. Bowen: We agree.

Q. Now, it may not be entirely clear, what do you mean by the plate?

A. That is the thin section between the hub—that is pressed on the axle, and the outer, the tread or the flange on the inside of the tread.

Q. That broke at or in the plate?

A. Yes sir.

Q. How do you know it first broke in the plate?

A. By the direction in which the metal ruptured.

Q. Which way did it rupture?

(Testimony of Claude R. Pflasterer.)

A. From the inside face, the flange side, outward. The edge at the outside is serrated, irregular, it is no trick to trace it.

Q. Do you mean from the hub out?

A. I mean in the thin part of the plate, between the hub and the outside, at a point where the plate metal is the thinnest. The reason these stresses are there is that the heaviest masses of the metal cool last, they don't cool as rapidly as the plate and set these stresses up.

Q. State whether or not the break that was in this wheel, or the internal stresses which you spoke of were they observable from the outside of the wheel?

A. No way to find them without cutting the wheel up. [292]

Mr. Bowen: I move to strike that as a conclusion of the witness, that there is no way to find them.

The Court: I cannot strike the answer and the question.

Mr. Bowen: I move to strike the answer for the purpose of objection.

The Court: It may be stricken.

Mr. Bowen: I object to the question upon the ground that it called for a pure conclusion of the witness.

The Court: He expressed his opinion from his personal knowledge. Overruled.

Q. In your examination of this wheel did you

(Testimony of Claude R. Pflasterer.)

discover any condition which indicated that there was any heat on this wheel? A. Nothing.

Q. On the broken parts did you find anything to cause the wheel to break?

A. No, it was bright and shiny, having been recently turned, the tool marks still on the outer part.

Q. State whether the breaks on the plate or core of the wheel were new or old breaks?

A. All new breaks.

Q. Do you know whether or not the breakage of wheels of this fashion is frequent or rare? [293]

A. They are rare, we have had two.

Q. In what period of time?

A. That has been during the time I have been in the laboratory, back to 1912.

Q. Do you know whether you have had any of these similar wheels in service during that time?

A. We have them now. We have wheels of that type all over the country.

Q. How long have you had them in service?

A. This particular wheel was manufactured, rolled in 1928.

Q. Do you know whether you have wheels in service now, dating from that time?

A. Yes, lots of them.

Q. Do you have any idea how many wheels of similar kind are now rolling, or in service, is it one or many?

(Testimony of Claude R. Pflasterer.)

Mr. Bowen: Objected to as incompetent, irrelevant and immaterial, beyond the issues in this case.

The Court: Overruled.

A. We have thousands of them.

Q. How long have you been using them?

A. Since they made rolled steel wheels.

Q. When did you first start to use the kind of wheels that were under this car, that particular car?

[294]

A. Since we started to use rolled steel wheels.

Q. How long ago was that?

A. To my knowledge better than thirty-five years, that is as long as I have been on the property.

Q. Can you state whether or not other railroads use the same kind of wheels?

A. Yes sir, made by the same mill to the same specifications.

Mr. Anderson: That is all. [295]

Cross Examination

By Mr. Bowen:

Q. I think you said that the defect in this wheel was in it when the wheel was made?

A. I said, or intended to say that it developed during the manufacturing of the wheel.

Q. The defect was in when the wheel was manufactured?

A. The stresses were during the manufacturing process.

(Testimony of Claude R. Pflasterer.)

Q. This defect was the defect of which you testified, in this wheel when it was manufactured?

A. I don't call it a defect.

Q. Was the stress that caused the wheel to break, present when the wheel was manufactured?

A. They developed during manufacture.

Q. The thing that caused the wheel to break was in there as soon as the wheel was turned out?

A. When it left the mill.

Q. The condition that caused the wheel to break would be a defect would it not?

Mr. Thompson: Objected to as argumentative.

The Court: Have you defined a defect?

A. Yes, I think I did.

The Court: Then this would be for the Court to determine.

Mr. Bowen: I guess that's right.

Q. Mr. Pflasterer, you made no inspection of the rails or [296] track at the point where this wreck occurred?

A. Yes, I did.

Q. You made an inspection? A. Yes sir.

Q. You inspected the rails and track, were they your duties as an engineer?

A. I do when the Vice-president tells me to.

Q. Did you inspect the track before the wreck?

A. No sir.

Q. It was after? A. Yes sir.

Q. Then, as to the condition of the track at the time of the wreck you don't know? A. No sir.

(Testimony of Claude R. Pflasterer.)

Q. The gauge may have been wide or tight at the time of the wreck?

Mr. Thompson: Objected to as not proper cross-examination.

A. I wouldn't know.

The Court: He has answered now, so it may stand.

Q. Was there a switch near the point of the wreck?

Mr. Thompson: Objected to as not proper cross-examination.

The Court: Sustained.

Q. I don't know whether it is clear or not, but how many [297] pieces of the broken wheel did you get?

A. I cut one off.

Q. The part that was on the hub and five others, were there?

A. Five without that part.

Q. What is the fact Mr. Pflasterer, as to whether or not climatic condition has anything to do with the various stresses that you have explained to us, in causing wheels to break.

A. What you want to know is whether these stresses were sufficient to cause the wheel to break.

The Court: He asked what effect the climatic condition has on it.

A. You can break steel in cold weather easier than when it is warm.

Q. Explain to the Court what effect cold weather has on steel as to contraction and expansion.

(Testimony of Claude R. Pflasterer.)

A. Severe cold weather would have an effect, but not the kind we had there. We design our wheels to take care of that.

Q. The climatic condition does have an effect?

A. Yes sir.

Q. Cold or hot?

A. I wouldn't say that hot weather does, on wheels of that type.

Q. Don't you have wheels break because of heat?

A. Not weather heat. Friction heat, brake shoes and so on. [298]

Q. You have heard of heat breaks?

A. Yes sir.

Q. Axles burning off? A. Yes sir.

Q. Of hot boxes? A. Yes sir.

Q. And wheels breaking?

A. More particularly chilled cast wheels.

Q. Any wheel? A. Yes.

A. It is a common thing.

A. It is not as common as it used to be. We have some wheels on the stream liners now,—we have alloys that stand all that.

Q. That is not unusual,—an unusual occurrence for them to heat from friction and develop cracks.

A. They do that, yes sir.

Q. I don't know whether I understood you. Did I understand you to say that the heavy masses of metal referring to the outside of the wheel, and the inside of the wheel, that those parts cooled first?

A. No, they don't cool first, that would be silly.

(Testimony of Claude R. Pflasterer.)

This plate cools first that is why we get stresses in the plate.

Mr. Bowen: That is all.

Redirect Examination

By Mr. Anderson: [299]

Q. From your examination of that wheel and its parts, are you able to say whether or not there was any friction or any heat produced to that wheel, which caused the break?

A. No sir, there was not.

Mr. Anderson: That is all.

Mr. Bowen: That is all.

ROBERT W. SAVAGE

Being called as a witness on behalf of the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Anderson:

Q. Will you state your name?

A. Robert W. Savage.

Q. Where do you live? A. Omaha.

Q. What is your occupation?

A. Head chemist for the Union Pacific.

Q. How long have you held that position?

A. Twenty-four years.

Q. What education and training did you have for that profession?

(Testimony of Robert W. Savage.)

A. Graduated from the University of Chicago, year of teaching, and graduate study.

Q. Have you been engaged in your line of work since graduating? A. Yes sir. [300]

Q. Are you a licensed chemical engineer in the State of Nebraska, Mr. Savage? A. Yes sir.

Q. What do you do as a chemical engineer of the Union Pacific Railroad Company?

A. I make, and have supervision of the making,—I will put it this way, I have supervision of the laboratory and make a great many chemical analyses for the Union Pacific.

Q. Of metals? A. Yes sir, metals.

Q. Did you have occasion to make a chemical analysis of a broken wheel in January 1940?

A. Yes, I did.

Q. Where did you receive the parts of that wheel, who did you receive them from, to make the analysis? A. Mr. Pflasterer.

Q. Do you know where it came from or what train it was in at the time it broke?

A. Yes, I did.

Q. What train was it in? A. Number 4.

Q. Where? A. Houston, Colorado.

Q. Do you know the date? A. Yes sir.

Q. What is the date? [301]

A. The 14th of January 1940.

Q. Will you state Mr. Savage, what your chemical analysis show of that wheel?

(Testimony of Robert W. Savage.)

A. Showed a carbon content of 172 of one per cent; manganese .82 of one per cent; phosphorus .039 of one per cent; sulphur .024 and silicon .27.

Q. Do you know whether these wheels are governed by chemical standards or specifications? Are they required to meet certain specifications?

A. Yes sir.

Q. What have you to say with reference to this wheel which you analyzed, as to whether or not, chemically, it was within the specifications required.

A. It was well within the specification limits.

Mr. Anderson: That is all, you may examine.

Mr. Bowen: No cross examination.

Mr. Anderson: The defendant rests.

A. G. STANGER

Being called in rebuttal on behalf of the plaintiff, having heretofore been duly sworn, testifies as follows:

Direct Examination

By Mr. Bowen:

Q. Mr. Stanger, directing your attention to exhibit 7, I will ask you to examine it and state, if you know, what it is? [302]

A. Yes sir.

Q. What is it?

A. It is the authority I gave Mr. Whitsell, in our office at the time he visited me, requesting this, with the understanding that if I——

(Testimony of A. G. Stanger.)

Q. —we will come to that later Mr. Stanger. Do you know who Mr. Whitsell is?

A. I was informed that he was a claim agent for the Union Pacific.

Q. Does his name appear on defendant's exhibit "7"?

A. It appears down below written in blue pencil.

Q. Who informed you that he was claim agent for the Union Pacific Railroad Company?

A. He did.

Q. Now, Mr. Stanger, at the time did Mr. Whitsell write defendant's exhibit "7" or did you?

A. He wrote it.

Q. After he wrote it what if anything did he do with it, did you sign it?

A. Yes sir, I signed it.

Q. Was there any conversation between yourself and Mr. Whitsell immediately before or at the time that you signed defendant's exhibit "7"?

A. Yes sir.

Q. Was that conversation regarding this case, or your injury that you received on the railroad?

[303]

A. Yes sir.

Q. What was said there at that time and place?

Mr. Thompson: I object to this question, there is a writing and the writing is the best evidence and speaks for itself, the question is irrelevant, incompetent and immaterial.

(Testimony of A. G. Stanger.)

The Court: Is it the purpose to bring out a conversation which relates to this exhibit? Is that the purpose?

Mr. Bowen: The conversation we seek to *illicit* is a conversation as to the reason for the making of defendant's exhibit "7" and for giving the authority that Mr. Stanger gave at the time, that is the purpose of this conversation.

The Court: Does it go to the extent of determining how broad this is, or the terms of this exhibit?

Mr. Bowen: It goes solely to Mr. Stanger's reason for the authority.

The Court: I think you may answer, limited to the reason for giving it.

Q. State what that conversation was.

A. Mr. Whitsell asked if I would give a statement so that their Doctors, or the Doctors that they suggested could examine me, that is, to bring about a settlement of this case, that it was their desire to have this examination with the understanding that it would be promptly taken [304] care of without further delay.

Mr. Thompson: The question was not put nor the answer given for the purpose stated but presented to the Court for the purpose of getting before the Court the suggestion that the claim agent, through an offer of compromise had gotten this statement, and both the question and answer are incompetent, irrelevant and immaterial. The claim

(Testimony of A. G. Stanger.)

agent is not shown to have any power to authorize settlement or recognize or determine liability.

The Court: The question is a broad one, and it goes to whether we can vary the terms of a written instrument.

(Further statement of counsel and Court)

The Court: The objection is sustained and the motion, if there was a motion to strike is granted.

Q. You did go to see Doctor Cline?

A. Yes sir.

Q. Did you call him or did he call you prior to your going to see him?

A. He called the office and left word for me to come to his office.

Q. What did you do?

A. I went up to his office.

Q. Did Doctor Cline, after you arrived there, suggest that you, or advise you to have a plaster paris cast applied [305] to your body?

A. Yes sir.

Mr. Bowen: That is all, you may cross examine.

Mr. Anderson: No cross-examination.

PHYLLIS STANGER

Being called in rebuttal, on behalf of the plaintiff, having heretofore been duly sworn, testifies as follows:

Direct Examination

By Mr. Bowen:

Q. Directing your attention to the evening of October 9, 1941, at the L. D. S. Hospital in Idaho Falls, at the time you were examined by Doctor Brothers, did you or not, state to Doctor Brothers at that time that you have been flowing excessively since the birth of your last child?

A. I did not.

Q. Did you say anything to the Doctor at that time about your condition of flowing at any time?

A. I did not.

Q. Directing your attention to November 10, 1940 at the time you were in the office of Doctor Wooley, in Idaho Falls, Idaho, yourself and the Doctor being present, did you or not state to Doctor Wooley that your period of flowing had been and was for a period of eight or ten days twice a month?

[306]

A. I did not.

Q. Did you or not, state to Doctor Wooley at that time and place that you had flowed excessively during the past four years?

A. I did not.

Mr. Bowen: That is all.

(Testimony of Phyllis Stanger.)

Cross Examination

By Mr. Anderson:

Q. Did you or not go to Doctor Wooley for the purpose of giving you some sort of treatment for excessive flowing? A. No sir.

Q. What did you go for?

A. To find out why I was not building up as fast as I should.

Q. And not for the purpose of checking the flow.

A. For checking the flow, but not excessive flowing.

Mr. Anderson: That is all.

Mr. Bowen: We rest.

The Court: Then Both Sides rest.

Mr. Anderson: At this time the defendant, at the close of the evidence, both sides having rested, moves the Court for judgment in defendant's favor and for a dismissal of the complaint in both cases which were consolidated for trial upon the following grounds and for the following reasons:

1. That the plaintiff has failed to establish that the defendant was guilty of any negligence but to the contrary [307] the evidence established, without dispute that the derailment was caused by a broken wheel, that said wheel broke from internal stresses, internal residual stresses, and that such condition

could not be observed by any kind of inspection except only such inspection or analysis as was made by the defendant's witness Pflasterer, who made tests of the metal after the wheel had broken, and that such breakage is extremely rare and is one that the defendant could not have guarded against.

2. That there is no evidence that plaintiff A. G. Stanger sustained any injuries as a result of such derailment.

3. There is no evidence that the Plaintiff Phyllis Stanger sustained any injuries as a result of said derailment, and that the condition she asserts was caused by the derailment was the same condition from which she had suffered before the derailment occurred.

The Court: I will take that under advisement as that would take care of the entire case. [308]

State of Idaho,
County of Ada—ss.

I, G. C. Vaughan, hereby certify that I am the official Court Reporter of the United States District Court, in and for the District of Idaho; that I am the reporter who took the testimony and proceedings in the above entitled cause in shorthand and thereafter transcribed the same into longhand, and I further certify that the foregoing transcript consisting of 253 pages exclusive of this certificate, is a true and correct transcript of the testimony given

and the proceedings had in and about the trial of the said cause.

In Witness Whereof, I have hereunto set my hand, this 9th day of January 1942.

G. C. VAUGHAN [309]

[Title of District Court and Cause.]

ORDER AS TO ORIGINAL EXHIBITS

The defendant in the above entitled cause having appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment entered herein, and it appearing to the court that defendant's Exhibits 1, 8 and 9, consisting of a hospital chart and photographs respectively, should be inspected by the appellate court and sent to the appellate court in lieu of copies thereof.

It Is Hereby Ordered that the original defendant's Exhibits 1, 8 and 9 be sent to the appellate court in lieu of copies thereof, to be by such court held for inspection and used on the appeal taken by the appellant, and it is further ordered that upon completion of the use thereof by the appellate court that the same be returned to this court.

Dated, this 31st day of January, 1942.

CHARLES C. CAVANAUGH

District Judge

[Endorsed]: Filed Jan. 31, 1942. [312]

[Title of District Court and Cause.]

MINUTES OF THE COURT OF
OCTOBER 20, 1941

Nos. 1148-E and 1149-E.

These cases having been set for trial before the Court at this time, Messrs. Clyde Bowen, W. H. Witty and John Ferebauer appeared as counsel for the plaintiffs and Messrs. H. B. Thompson and L. H. Anderson appeared as counsel for the defendant.

A stipulation of counsel for the consolidation of the causes for the purpose of trial was presented. The Court signed order of consolidation and, upon agreement of counsel, designated the consolidated title of the causes as Albert G. Stanger and Phyllis Stanger against Union Pacific Railroad Company.

The consolidated causes then came on for trial before the Court. Upon request of plaintiffs' counsel, it was ordered that all witnesses in the cause be excluded from the court room until such time as they may be called to testify.

Albert G. Stanger, Dr. H. Ray Hatch, Phyllis Stanger and Dr. J. H. Lind were sworn and examined as witnesses on the part of the plaintiffs. The trial of the cause was continued to 10 o'clock A. M., October 21, 1941. [313]

[Title of District Court and Cause.]

MINUTES OF THE COURT OF
OCTOBER 21, 1941

This consolidated cause came on for further trial before the Court, with counsel for the respective parties present.

Albert G. Stanger was recalled and further examined as a witness for the plaintiffs, and here the plaintiffs rest.

George Orullion, Lee Walker, P. J. Lewis, Albert Gardner, Dr. C. M. Cline, Dr. Hoyt B. Woolley, Dr. W. W. Brothers and O. R. Nichols were sworn and examined as witnesses, and other evidence was introduced, on the part of the defendant.

Further trial of the cause was continued to 10 o'clock A. M. on October 22, 1941. [314]

[Title of District Court and Cause.]

MINUTES OF THE COURT OF
OCTOBER 22, 1941

The trial of this consolidated cause was resumed before the Court, with counsel for the respective parties present.

John H. Schroeder, C. R. Pflasterer and R. W. Savidge were sworn and examined as witnesses and other evidence was introduced on the part of the defendant, and here the defendant rests.

On rebuttal Albert G. Stanger and Phyllis Stanger were recalled and examined as witnesses on the part

of the plaintiffs, and here the plaintiffs rest and both sides close.

The defendant's counsel moved the Court for a dismissal of the complaints and the entry of judgment in favor of the defendant.

After hearing argument of counsel for the respective parties on the motion, the Court granted the plaintiff five days in which to file brief and the defendant the five days following. [315]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS
OF RECORD ON APPEAL

Comes now the defendant-appellant, Union Pacific Railroad Company, a corporation, and hereby designates the contents of the record, proceedings and evidence to be contained in the record on appeal of the above entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit, as follows:

The complete record and all the proceedings and evidence in the action, including——

1. Complaint
2. Answer
3. Order of Removal (From the State Court to the United States District Court)
4. Opinion of the court dated December 6, 1941

5. Findings of Fact and Conclusions of Law
6. Judgment, with direction for entry thereof
7. Objections to Findings, and Motion to Amend Findings and Conclusions of Law and Motion to Strike, Amend and Substitute, together with the ruling of the court thereon, showing exception
8. Petition and Motion for New Trial
9. Order Denying Petition for New Trial
10. Notice of Appeal
11. Petition for approval of supersedeas and stay on appeal
12. Order Approving Bond and Granting Stay of Execution
13. Supersedeas Bond
14. Cost Bond on Appeal [316]
15. All testimony taken at the trial, the same being contained in the Reporter's Transcript, two copies of which are herewith filed with the Clerk of this Court
16. Exhibits numbered 1, 2, 8 and 9
17. Order of Court Transmitting original Exhibits 1, 8 and 9
18. All Court Minutes
19. Two copies of Reporter's Transcript
20. This Designation of Contents of Record, Proceedings and Evidence on Appeal, and Proof of Service.

Dated, this 3rd day of February, 1942.

GEO. H. SMITH

Attorney for Defendant-

Appellant,

Residing at Salt Lake City,
Utah.

H. B. THOMPSON,

L. H. ANDERSON,

Attorneys for Defendant-

Appellant,

Residing at Pocatello, Idaho.

Service of the foregoing Designation of Contents of Record on Appeal by receipt of a copy thereof is hereby admitted this 3rd day of February, 1942.

JOHN FEREBAUER,

CLYDE BOWEN,

Attorneys for Plaintiffs-

Appellees.

[Endorsed]: Filed Feb. 4, 1942. [317]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK OF UNITED
STATES DISTRICT COURT TO TRAN-
SCRIPT OF RECORD.

United States of America,

District of Idaho—ss.

I. W. D. McReynolds, Clerk of the District Court of the United States, for the District of Idaho, do hereby certify the foregoing typewritten pages

numbered 1 to 317, inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal thereon in the United States Circuit Court of Appeals for the Ninth Circuit, in accord with designation of contents of record on appeal of the appellant, as the same remain on file and of record in the office of the Clerk of said District Court, and that the same constitutes the record on the appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I Further Certify That the fees of the Clerk of this Court for preparing and certifying the foregoing typewritten record amount to the sum of \$35.00, and that the same have been paid in full by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, this 19th day of February, 1942.

(Seal) W. D. McREYNOLDS,
Clerk.

[Endorsed]: No. 10063. United States Circuit Court of Appeals for the Ninth Circuit. Union Pacific Railroad Company, a corporation, Appellant, vs. Albert G. Stanger and Phyllis Stanger, Appellee. Transcript of Record. Upon Appeal from the Dis-

trict Court of the United States for the District of Idaho, Eastern Division.

Filed February 24, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals for
the Ninth Circuit

No. 10063

UNION PACIFIC RAILROAD COMPANY, a
corporation,

Appellant,

vs.

ALBERT G. STANGER AND PHYLLIS
STANGER,

Appellees.

STATEMENT OF POINTS ON WHICH THE
APPELLANT, UNION PACIFIC RAIL-
ROAD COMPANY, INTENDS TO RELY
ON APPEAL, AND DESIGNATION OF
RECORD.

Comes now the appellant, Union Pacific Rail-
road Company, by its attorneys herein, and respect-
fully represents to this Honorable Court that in the
above styled and numbered cause it intends to rely
upon the following statement of points on appeal:

I.

That the evidence is insufficient to support a finding that the defendant was guilty of any negligence as charged in the complaint, for which reason the court erred in denying the defendant's motion for judgment and in making and entering findings of fact and conclusions of law and judgment in favor of the plaintiffs.

II.

The court erred in denying the defendant's motion for judgment, and its motion for new trial for the reasons set forth in paragraph I hereof.

III.

The court erred in holding and finding that the plaintiff Phyllis Stanger was in "reasonably good health prior to the accident", and erred in holding and finding that she was severely and permanently injured internally, and that she will continue to suffer nervously and/or physically in consequence thereof so long as she may live.

IV.

The court erred in holding and finding that the operation which was performed by Dr. Hatch on Phyllis Stanger in July, 1940, was necessitated by or because of injuries received by her at the time of or in the accident or derailment, and in basing his award of damages on such findings and assumption, without regard to her chronic ailment or disorder.

V.

The court erred in holding and finding that excessive flowing caused by the derailment necessitated

an operation which made Phyllis Stanger sterile, and in holding and finding that "the nervous shock and all of the personal injuries suffered and received by the said plaintiff Phyllis Stanger in said accident were due to and proximately caused by the negligence and carelessness of the defendant, its agents, servants and employes", and in assessing or awarding damages on that basis.

VI.

The court erred in holding and finding that the uterus of Phyllis Stanger was removed because of the injuries received by her at the time of the accident, or derailment, and that thereby she was caused to become sterile, through the fault or negligence of the defendant, and in assessing or awarding damages for the removal of said uterus and for sterility and for nervous and other injuries which he erroneously found to be permanent, without taking into account or making allowance for the chronic ailment or disorder with which she was afflicted.

VII.

The Court erred in refusing to strike paragraph VII of its findings of facts and substitute in lieu thereof the findings set forth in paragraph III of the defendant's objections to findings and motion to amend the same.

VIII.

Mrs. Stanger was suffering from chronic cervicitis and a fibrous uterus, the result of previous

child birth and infection, for the cure of which an operation was necessary and was performed which caused her to be sterile, and the defendant was not and is not liable therefor, and the court erred in failing, in rendering judgment, to take into account that said Phyllis Stanger had an established or chronic condition or disorder of her uterus and other related organs, which was the basic cause of her operation, and which it was necessary to operate upon to cure, and that the defendant could not lawfully be charged therewith, but for the consequences of which the court erroneously awarded and assessed damages against the defendant, without making allowance for said chronic or preexisting condition, as is more fully set forth in paragraph I (c) of the defendant's motion for new trial.

IX.

For the reasons stated in paragraph VIII hereof, the judgment is excessive and the evidence is insufficient to justify the decision and it is against law.

The appellant deems the entire record as filed to be necessary for the consideration of the contentions above enumerated.

Dated this 26th day of February, 1942.

Respectfully Submitted,

GEO. H. SMITH,

H. B. THOMPSON,

L. H. ANDERSON,

Attorneys for Appellant,

Union Pacific Railroad

Company.

Service of the foregoing, and receipt of a copy, this 26th day of February, 1942, is hereby acknowledged.

JOHN FEREBAUER,

CLYDE BOWEN,

Attorneys for Appellees.

[Endorsed]: Filed March 2, 1942. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPLICATION FOR ORDER DISPENSING
WITH PRINTING EXHIBITS

To the Honorable Judges of the Ninth United
States Circuit Court of Appeals:

The petition of the Union Pacific Railroad Company, a corporation, respectfully shows:

That an appeal has been perfected by your petitioner to this court from a judgment rendered in the United States District Court for the District of Idaho in a suit wherein Albert G. Stanger and Phyllis Stanger were plaintiffs, as more fully appears from the affidavit of H. B. Thompson hereunto attached and made a part hereof.

Also as appears from said affidavit three exhibits were received in evidence, numbers 1, 8 and 9, respectively, which are not of a printable type, numbers 8 and 9 being photographs, and number 1 being a hospital chart, the circumstances of their unprint-

ability and the grounds for this motion appearing more particularly in the annexed affidavit.

Wherefore, Your Petitioner Prays, for an order dispensing with the printing of said exhibits, the originals of which will be forwarded by the Clerk of the District Court to this court in due course of appeal.

UNION PACIFIC RAILROAD
COMPANY,

By GEO. H. SMITH,
H. B. THOMPSON,
L. H. ANDERSON,
Attorneys for Appellant.

So Ordered:

FRANCIS A. GARRECHT,
United States Circuit Judge.

[Title of Circuit Court of Appeals and Cause.]

State of Idaho,
County of Bannock—ss.

H. B. Thompson, being first duly sworn, deposes and says:

That he is one of the attorneys for the Union Pacific Railroad Company, appellant herein, and makes this affidavit on behalf of said appellant for the purpose of securing an order dispensing with the

printing of three exhibits in this case, defendant's exhibits 1, 8 and 9.

That judgment was rendered herein in favor of the plaintiffs against the defendant on December 24, 1941, and that on December 31st, 1941, the defendant perfected an appeal to this court by filing an original and copy of notice of appeal and undertaking on appeal, and has since served and filed the additional papers required by the Rules of Court.

That on December 31, 1941, the District Judge, Honorable Charles C. Cavanah, made an order for the originals of the aforesaid exhibits to be forwarded to this court with the record on appeal. Said exhibits are not of a printable type because exhibits numbered 8 and 9 are photographs of the core or body of the wheel of a railroad car, exhibit numbered 1 is a hospital record of the plaintiff Phyllis Stanger, consisting of twenty-three pages on printed forms, consisting of patient's admittance record, case history, operation record, graphic chart of temperature, nurses record, with printing and writing on both sides of portions thereof. Some of the writing is disputed between counsel, and some of it is difficult to decipher, and if the clerk of the court were to have it printed he might have to decide disputed questions. Deponent further says that he has requested opposing counsel to join in a stipulation for the relief herein sought, but opposing counsel

have declined so to do, upon the ground that said exhibit was received over their objection.

H. B. THOMPSON.

Subscribed and sworn to this 26th day of February, 1942.

(Seal)

ROSA ENKE,

Notary Public for Idaho,

Residing at: Pocatello, Idaho.

[Endorsed]: Filed Mar. 2, 1942. Paul P. O'Brien,
Clerk.

